

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA, )

5 Plaintiff, )

Case No. 3:17-cr-00226-JO

6 v. )

7 July 16, 2018

8 W. JOSEPH ASTARITA, )

9 Defendant. )

Portland, Oregon

10  
11  
12  
13  
14 PRETRIAL CONFERENCE

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE ROBERT E. JONES

17 UNITED STATES DISTRICT COURT SENIOR JUDGE  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

FOR THE PLAINTIFF:

GARY Y. SUSSMAN  
U.S. Attorney's Office  
1000 SW Third Avenue  
Suite 600  
Portland, OR 97204

FOR THE PLAINTIFF:

PAUL T. MALONEY  
U.S. Attorney's Office  
1000 SW Third Avenue  
Suite 600  
Portland, OR 97204

FOR THE DEFENDANT:

DAVID H. ANGELI  
Angeli Law Group  
121 SW Morrison Street  
Suite 400  
Portland, OR 97204

FOR THE DEFENDANT:

TYLER FRANCIS  
Angeli Law Group  
121 SW Morrison Street  
Suite 400  
Portland, OR 97204

FOR THE DEFENDANT:

JOANNA PERINI-ABBOTT  
Angeli Law Group  
121 SW Morrison Street  
Suite 400  
Portland, OR 97204

FOR THE DEFENDANT:

ROBERT M. CARY  
Williams & Connolly LLP  
725 Twelfth Street NW  
Washington, DC 20005

FOR THE DEFENDANT:

MEGHAN A. FERGUSON  
Williams & Connolly LLP  
725 Twelfth Street NW  
Washington, DC 20005

1 COURT REPORTER: Jill L. Jessup, CSR, RMR, RDR, CRR, CRC  
2 United States District Courthouse  
3 1000 SW Third Avenue, Room 301  
4 Portland, OR 97204  
5 (503) 326-8191  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

TRANSCRIPT OF PROCEEDINGS

(July 16, 2018)

(In open court:)

THE COURT: Good morning, everyone. Have a seat, please.

MR. SUSSMAN: Good morning, Your Honor, Gary Sussman and Paul Maloney, appearing for the United States. This is the time and place set for the final pretrial conference in the case of United States of America v. W. Joseph Astarita. Case No. 3:17-cr-226. Mr. Astarita is not present this morning, having previously waived his appearance; however, he is represented by five attorneys this morning. They are Mr. Rob Cary and Ms. Meghan Ferguson from the Williams & Connolly firm in Washington, D.C. Mr. Dave Angeli and Tyler Francis and Ms. Joanna Perini-Abbott from the Angeli Law Firm.

Your Honor, there's a number of matters pending before the Court for resolution this morning, and the government is ready to proceed in whichever order the Court desires.

THE COURT: Thank you. I'll proceed.

First of all, we have resolved the jury issues. We had 300 jurors noticed. Of those, 150 responded that they would be available. That has since reduced to 118. The jurors are scheduled to come in Tuesday. The issue on the jury questionnaire has been resolved. There will be a jury questionnaire, the joint questionnaire only, and that will be

1 submitted to the jury when they come in at 8:00 a.m. on a week  
2 from tomorrow, and the jury commissioner estimates that it will  
3 take them about an hour to fill out the -- those  
4 questionnaires, and that will be reformatted because some of  
5 the questions are open-end questions that will require some  
6 writing. So I'll ask whoever -- whichever side prepared those  
7 to coordinate with the jury commissioner, who I introduced you  
8 to this morning, so that she can then make up, from her  
9 computer, the jury questionnaire and make the copies and so  
10 forth.

11 Yes, sir.

12 MR. MALONEY: Yes, Your Honor. Paul Maloney for the  
13 government. I think that task is going to fall to me. The  
14 parties wanted to clarify with the Court whether you wanted the  
15 juror questionnaire that was previously submitted or the joint  
16 jury voir dire that the parties submitted with our pretrial  
17 documents.

18 THE COURT: The joint one.

19 MR. MALONEY: The joint one that we submitted with  
20 our pretrial conference documents?

21 THE COURT: Yes.

22 MR. MALONEY: Thank you, Judge.

23 THE COURT: Any questions?

24 Yes, and we will call in 75 so that we aren't bringing  
25 in -- that's the agreed -- the commissioner said you were asked

1 how many do you want physically here, and both parties reported  
2 75; is that correct?

3 MR. CARY: Yes, Your Honor. That's correct.  
4 Rob Cary for Mr. Astarita. 75 is fine.

5 One point of clarification, I believe I have this right,  
6 and government counsel can correct me if I'm wrong, but we did  
7 have a joint questionnaire that was already formatted with more  
8 space that we had done. It had one additional question that we  
9 wanted on it that was taken out when it became -- we thought it  
10 was going to be voir dire instead of a written question, and  
11 our proposal would be that we actually provide that joint  
12 written questionnaire that's already formatted, that the jury  
13 commissioner could change a little bit if she needs to, but  
14 provide that. I think it would remove one additional step from  
15 the process.

16 THE COURT: Do you agree?

17 MR. MALONEY: We're fine with that, Your Honor.

18 THE COURT: That's fine. It's up to you, then.

19 The next issues -- I have your witness list. Jointly, the  
20 parties have requested 100 witnesses, approximately. The -- I  
21 have only the names of those. The government has requested, I  
22 believe, 72. Just a minute. Yeah, I have it here.

23 MR. MALONEY: Yes, Your Honor, there are 72 witnesses  
24 there.

25 THE COURT: Okay.

1 MR. MALONEY: We have included some of them, even  
2 possible -- possible rebuttal witnesses. We think at trial we  
3 may be able to narrow the issues.

4 THE COURT: I warned you. It's not at trial that  
5 we're going to make these decisions. It's today. Final  
6 pretrial conference means what witnesses are you going to call?

7 MR. MALONEY: And, Your Honor, those are --

8 THE COURT: Did I make that clear?

9 MR. MALONEY: Yes, you did, Judge, and those are all  
10 the potential witnesses that we need the jurors to identify  
11 whether they know or have conflicts with before they testify.  
12 Some of them are trial case-in-chief witnesses. We included  
13 possible rebuttal witnesses, as well, in order to be thorough  
14 and complete.

15 THE COURT: Let me ask you -- have a seat.

16 The defendant's witness list is an additional 19 with an  
17 additional 8 as possible impeachment. Of course, the  
18 impeachment witnesses they won't know whether to call until  
19 you've had the direct testimony. I do note that the defense  
20 lists the defendant, W. Joseph Astarita, as testifying.  
21 It's -- it says "the defense may call." The last time I talked  
22 to you, you said you hadn't decided.

23 MR. ANGELI: That remains the case, Your Honor. And,  
24 of course, it will be Mr. Astarita's decision at the end of the  
25 day.

1 THE COURT: Say that again now.

2 MR. ANGELI: It remains the case that we have not yet  
3 decided, and, of course, it will be his decision at the end of  
4 the day.

5 THE COURT: That's fine. That's not unusual.

6 Of your 72 witnesses that you've listed, can you tell me  
7 for sure which ones are going to testify? Would you like some  
8 time to -- later on this morning to advise the Court?

9 MR. MALONEY: If we could advise the Court later this  
10 afternoon, after the pretrial rulings, that may provide some  
11 clarity in which we can narrow the witness list, Your Honor.

12 THE COURT: Normally, at the final pretrial  
13 conference we have the list of the people and one sentence or a  
14 small paragraph of what they're going to say.

15 Are you prepared to do that?

16 MR. MALONEY: We can provide that to the Court. I'm  
17 not sure if I can get -- I can get that to you in writing  
18 tomorrow morning.

19 THE COURT: I don't need it in writing. I just need  
20 to know what they're going to say and who they are and whether  
21 there's any objection to them. That's what we -- we're here to  
22 clarify. So tomorrow morning won't work.

23 I'll cover Motion in Limine No. 119. That is to preclude  
24 the lay opinion of then-Police Officer Wes Murphy regarding the  
25 left rear wheel of Finicum's truck. I thought we had that



1 resolved.

2 MR. SUSSMAN: Yes and no, Your Honor. We still don't  
3 have -- we still object to Officer Murphy testifying as to his  
4 opinion as to whether or not the left wheel continued to spin  
5 and for how long because we don't think he's qualified to give  
6 that opinion. However, they have since brought in an  
7 automotive mechanic, who, assuming his qualifications pan out  
8 at trial, probably would be qualified to testify to that. So  
9 we don't have an objection to the qualified automobile mechanic  
10 testifying to that, but we don't think a police officer is  
11 qualified to give that opinion testimony.

12 THE COURT: All right. Now, let's -- so we still  
13 understand each other, you do not require anybody to testify,  
14 expert or from lay experience, that when you have a stick  
15 shift -- which we have; right?

16 MR. SUSSMAN: Right.

17 THE COURT: And that the -- you can have the motor  
18 running and the wheels spinning at the same time, is that  
19 correct, while in -- while in the snowbank?

20 MR. SUSSMAN: With nobody behind the wheel of the  
21 car?

22 THE COURT: Yeah.

23 MR. SUSSMAN: That's where I think we do need someone  
24 with some expertise to testify to that, Your Honor, because  
25 when we spoke with Officer Murphy, he started talking about

1 transmission differentials and all this other stuff. We asked  
2 him, "Are you a mechanic?"

3 He said, "No."

4 We asked him, "Are you an engineer?"

5 He said, "No."

6 We asked him, "Are you a trained accident  
7 reconstructionist?"

8 And he said, "No."

9 He just has this general experience, you know, of having  
10 driven for a number of years and having been stuck in the mud  
11 one time, and we don't think that qualifies him to offer  
12 opinions on what differentials do and whether one wheel can  
13 continue spinning, even though others can't, with a manual  
14 transmission that's stuck in the snow and nobody behind the  
15 wheel.

16 Now, if they have a qualified automotive mechanic that can  
17 testify to that, let the mechanic testify to that. The officer  
18 can testify what he saw, his personal observations. We have no  
19 problem with that.

20 THE COURT: Which is what? What he did see?

21 MR. SUSSMAN: When the truck was removed from the  
22 snow, he saw what was described as a rut underneath the left  
23 rear wheel that had a coating of ice on it, and he saw what we  
24 described as -- I think he called it scrapings, or something  
25 like that, on the -- on the wheel.

1 THE COURT: Is that what you've agreed to?

2 MR. SUSSMAN: We don't have a problem with his  
3 personal observations.

4 THE COURT: Does that include wheel turning?

5 MR. SUSSMAN: That's his opinion that goes on top of  
6 that.

7 THE COURT: Is that an opinion, or is it an  
8 observation?

9 MR. SUSSMAN: He doesn't observe the wheel turn. He  
10 wasn't there. All he saw was -- he came hours later with the  
11 rest of the investigators. He reached a conclusion that the  
12 wheel continued to spin for some time, and that's what caused  
13 the rut, and that's what caused the freezing, and that's what  
14 caused the scraping, and he opined that that could happen even  
15 though all the rest of the wheels were firmly stuck up to their  
16 axles in the snow, and that's what we think requires expert  
17 testimony.

18 MR. ANGELI: Good morning, Your Honor, we do, indeed,  
19 intend to call --

20 THE COURT: If you just remain seated and speak into  
21 the microphone, please.

22 MR. ANGELI: Will do.

23 Your Honor, we will be calling an expert witness, an  
24 expert mechanic, to talk about the issues with the  
25 differentials and the manual transmission and the like.

1 With respect to Detective Murphy, he's a 10-year member of  
2 the Bend Police Department. He's a detective. He's been  
3 extensively trained in crime scene processing. He's lived in  
4 eastern Oregon for apparently 50 years, and his testimony will  
5 be, "I got there, and here's what I saw. I saw when that truck  
6 was pulled out there was smooth ice underneath the left rear  
7 tire. There was ice and snow that had been kicked up on the  
8 sidewall of that tire, and that, to me, based on all of my  
9 experience and training, is consistent with that left wheel  
10 having spun for some period of time after the truck came to a  
11 stop."

12 And we believe that that is heartland Rule 701. It's a --  
13 it's the lay opinion based on -- you know, as the Ninth Circuit  
14 has said, a process of reasoning familiar in everyday life.  
15 This is a detective who's going to say all of these things are  
16 consistent with what I've seen in my life and in my career as a  
17 police officer as being consistent with that wheel having spun.

18 THE COURT: His experience is limited to wheels  
19 spinning in some mud?

20 MR. ANGELI: I think his experience -- all of us  
21 probably, Your Honor, would draw that -- a similar conclusion  
22 from the observations that he made, and he's been processing  
23 crime scenes for ten years and --

24 THE COURT: I'm not worried about that. I am  
25 concerned about what he saw at the time.

1 MR. ANGELI: And that is what he saw at the time. A  
2 wheel --

3 THE COURT: I'll limit him to what he saw at the  
4 time. Any conclusions beyond that, I'll take as an offer of  
5 proof, and he'll either admit it or reject it at that time  
6 after I've heard him.

7 MR. ANGELI: Okay. So we'll lay a foundation,  
8 Your Honor, and then you'll make a decision?

9 THE COURT: Yes.

10 MR. ANGELI: Okay. Thank you.

11 THE COURT: Then, procedurally, somebody still asked  
12 for an instruction on sidebar conferences. I thought if I ever  
13 communicated anything to anybody -- we never do that in this  
14 jurisdiction. Ever. So we don't have sidebar conferences.

15 If you have something to take up with the jury, we have  
16 the jury go into recess -- step out. We don't have whispering  
17 contests up here. We don't approach the bench and offer this  
18 and offer that. That just isn't done. So I hope we've made  
19 that clear. So that instruction will not be given, and we  
20 won't go into that any further.

21 The next issue is the opinion of Officer 3 as to what he  
22 believed or who fired the shot that hit the roof of Finicum's  
23 truck. My ruling is to exclude that as an improper -- just his  
24 estimate or guess. The -- unless somebody wants to be heard,  
25 that's my ruling.

1 MR. ANGELI: Your Honor, may I be heard briefly?

2 THE COURT: Yes.

3 MR. ANGELI: Okay.

4 THE COURT: No, you can be heard. That's -- I want  
5 you to -- now is to be heard, brief or not. Just say what's on  
6 your mind.

7 MR. ANGELI: There were two grounds upon which we  
8 moved -- which we opposed the motion regarding Officer 3. I  
9 think I've heard Your Honor's ruling, so I won't break my pick  
10 on the first ground, which is we think, based on the fact that  
11 he was an eyewitness to the events, that he was looking at  
12 Agent Astarita when the shots were fired, that he saw the  
13 muzzle flashes from Officer 1's rifle moments later when he  
14 fired the shots, that he was aware what the trajectory angles  
15 were that were being measured on the truck, that based on all  
16 of that body of knowledge in his 20-years-plus as a SWAT  
17 officer, we think he's qualified, under Rule 701 and 702, to  
18 offer that opinion.

19 But, second, Your Honor, the second ground that we argued,  
20 I think the Ninth Circuit has made clear that we should have  
21 some latitude to be able to explore the integrity of the  
22 investigation and whether this was a biased investigation. And  
23 the fact that he made this disclosure to the investigators  
24 while they were examining the truck, based on everything that  
25 he knew, I think we're entitled to explore what the

1 investigators and the forensics people -- what, if anything,  
2 did they do with that information?

3 And, interestingly, it's not even noted in the  
4 investigative reports. It fell out of the investigative  
5 reports that he made this disclosure to them. And so that's  
6 the second basis. Whether it's independently admissible as an  
7 opinion, I think we're entitled to explore what the  
8 investigators did, if anything, with this information when they  
9 received it.

10 And just to give Your Honor a little bit more background  
11 on this issue of the integrity of the investigation, there was  
12 a press conference that was held in March of 2016 before the  
13 grand jury ever even heard from a single witness in this case,  
14 and at that press conference the Deschutes County sheriff, who  
15 was leading this investigation, announced that he had concluded  
16 that an HRT agent is the one who fired the shot. And this was  
17 just weeks after Officer 3 had offered his opinion to the  
18 investigators.

19 And, subsequently, the grand jury proceeded and, to our  
20 knowledge, did not call a single Oregon State Police officer to  
21 testify in the grand jury. Not one. Again, notwithstanding  
22 the fact that this person who has been training with Officer 1  
23 for the last ten years, or so, and has been a SWAT member for  
24 over 20 years offered his opinion.

25 So I apologize for the long lead-up, but --

1 THE COURT: That's fine.

2 MR. ANGELI: The second basis we're offering this is  
3 on the issue of was this a fair and unbiased investigation.

4 THE COURT: All I can say is it confuses the issues.  
5 We're dealing with -- I'm not going to allow a lay opinion or  
6 expert opinion as to who -- as to this witness's conclusions.  
7 They will be excluded. That is a -- all my rulings today will  
8 be definitive unless I advise you to the contrary. So that's  
9 where we are.

10 The next defendant's -- the -- we're looking now at  
11 Defendant's Motion in Limine No. 120. By the way, I was  
12 referring to Officer 3 under No. 130 of the government's  
13 motions in limine.

14 I'm now turning to No. 120. Motion to exclude testimony  
15 overheard video regarding six missing shell casings.

16 Do you wish to speak to that?

17 MR. FRANCIS: Yes, Your Honor. Excuse me. Yes,  
18 Your Honor. Tyler Francis for Special Agent Astarita.

19 Your Honor, this is a completely uncontrolled scene. We  
20 have vehicles driving through, people walking all over, and  
21 plenty of people around during the daytime who would have been  
22 in a position to see anything like what the government is  
23 alleging happened here with these shell casings.

24 The government is arguing that evidence that someone  
25 concealed evidence is admissible to show consciousness of



1 guilt, and it sure is, but first you have to show that someone  
2 actually concealed evidence. They have no evidence, none, that  
3 Special Agent Astarita picked up any shell casings from that  
4 scene.

5       Instead of evidence of that, they want the jury to  
6 speculate that he did. And if they can't do that, they want to  
7 take a shortcut. They want to argue it doesn't matter who  
8 picked up the shell casings as long as it was someone from the  
9 FBI. So they want the jury to conclude, number one, that  
10 Special Agent Astarita knew that someone else from the FBI had  
11 picked these up and that he, quote, acquiesced to those actions  
12 and therefore can be held responsible for them. And, again,  
13 without any evidence, and, frankly, without support in the law.

14       They go hunting for case law to support this guilt by  
15 association notion, and the case they come up with is if a  
16 co-conspirator murders a witness, then the defendant loses his  
17 confrontation clause rights. That's a far cry from what's  
18 happening here. They couldn't find some shell casings that  
19 someone saw earlier, so, therefore, someone must have stolen  
20 them. The FBI is looking for gear that they dropped, so they  
21 must have picked up the shell casings, too, while they're at  
22 it. And Special Agent Astarita worked for the FBI, so he must  
23 be responsible for anything they do.

24       Even if they can't prove he actually did anything himself,  
25 that chain of inferences that's required to make this testimony

1 relevant is simply too attenuated and it should be excluded.

2 THE COURT: Your response?

3 MR. SUSSMAN: Well, those are their interpretations  
4 of the evidence, but the jury is entitled to draw its own  
5 interpretations and its own inferences from the evidence. And  
6 the evidence is this: There were shell casings on the roadway,  
7 and they were seen on the roadway in at least two different  
8 locations by several different officers or agents; and, yet,  
9 when they went to collect those shell casings from the roadway,  
10 they were gone. And some of the shell casings that  
11 disappeared, disappeared in an area right in front of a truck  
12 that was parked in the middle of the roadway, but into the  
13 southbound lane, that did not move at any time before the  
14 investigators got out there to look for those shell casings, in  
15 a place where there was no vehicular traffic going because of  
16 the truck being in the way, in a place where the only people on  
17 the scene were law enforcement officers.

18 This wasn't an uncontrolled scene where members of the  
19 public were coming in and coming out. That is a  
20 mischaracterization. This was a controlled scene where the  
21 only people present were law enforcement officers, and,  
22 frankly, once the two officers who had shot and admitted  
23 shooting were removed from the scene, there were very few  
24 Oregon state troopers there. They were there on the perimeter  
25 for scene security.

1           The people that were wandering around in the middle of  
2 this crime scene, tromping in and out of this unsecured crime  
3 scene, were HRT operators, and they can be seen on the overhead  
4 video bending over, picking things up, looking under vehicles,  
5 and all of this in an area where evidence from a crime scene  
6 was located.

7           They took that stuff. Those shell casings didn't pick up  
8 and walk themselves off the scene. They didn't go off the  
9 scene in car tire treads because there were no vehicles going  
10 through the area where at least some of those shells were seen.  
11 They disappeared because somebody picked them up.

12           That's the inference we're going to ask the jury to draw,  
13 and that's a permissible inference based on the evidence. And,  
14 for that reason, Your Honor, even though the agents may be able  
15 to offer a different explain, such as "We were looking for  
16 sensitive items" -- which, by the way, they didn't pick up and  
17 were recovered on the scene -- then, you know, that's an  
18 inference that they can raise, and that's an inference that the  
19 jury is free to either accept or reject. But the fact that  
20 there are alternative inferences available does not make the  
21 evidence of disappeared shell casings irrelevant or improper in  
22 this case.

23           THE COURT: Is there any evidence that the defendant  
24 picked up any of the shell casings?

25           MR. SUSSMAN: Defendant was one of the people seen on

1 the video wandering around in the crime scene. We also know  
2 that --

3 THE COURT: What's the answer to my question?

4 MR. SUSSMAN: Well, we can't see what was being  
5 picked up because it's from the FBI video, but we know that he  
6 was looking in the -- he and the other HRT operators were  
7 looking in the area where shell casings had been.

8 THE COURT: Other HRT operators are not the  
9 defendant. My question is directed at is there any evidence  
10 that the defendant bent over or had anything to do with the  
11 shell casings?

12 MR. SUSSMAN: Well, we do know he was one of the  
13 people out there picking stuff up and looking for stuff at the  
14 scene at least, and we also know that --

15 THE COURT: Now, you jumped two things. Is there any  
16 evidence that he picked up any shell casings? Yes or no?

17 MR. SUSSMAN: Do I have a witness who says, "I saw  
18 him pick up the shell casing"? The answer to that is no.

19 THE COURT: Okay.

20 MR. SUSSMAN: But we do have every other operator who  
21 was there expressly deny picking up shell casings, and we know  
22 that defendant approached a fellow operator and said, "Hey, did  
23 you see anything on the ground?" So we know he's looking for  
24 stuff on the ground.

25 THE COURT: Thank you.

1           We're not going to unscramble what happened at the scene.  
2       What happened at the scene happened at the scene. It has some  
3       relevance, and the motion to exclude will be denied.

4           In respect to the next issue, motion to exclude Haag  
5       testimony, that the defense team sought to retain him, that has  
6       been agreed will not be brought up, unless, for some reason, on  
7       challenging Haag's qualifications, the defense opens the door  
8       for it. That will be granted.

9           Motion to exclude Piazza's testimony, that the defense law  
10      firm retained him in a previous case, the same ruling, that  
11      will be excluded, unless -- which is not going to happen -- the  
12      defense opens the door for that.

13          The next issue is to exclude the testimony from  
14      Jeff Smith. There's been no offer from Catalin Grigoras, that  
15      I know of, regarding the method of identifying gunshot sounds  
16      on audio recording, and Terpstra's method in producing his 3D  
17      model.

18          Would you like to speak to that?

19                 MR. FRANCIS: Your Honor, I think we're closer on  
20      this issue than we were when we started. The government's  
21      response makes it clear that there -- they may call  
22      Professor Smith or Grigoras about other things they did besides  
23      vouching for what Mr. Terpstra did.

24          To the extent that's their testimony, that's not the  
25      subject of our motion. Our motion had to do with the subject

1 of Mr. Smith's testimony, similar to his testimony at the  
2 *Daubert* hearing, that was primarily to vouch for Mr. Terpstra.

3 THE COURT: Do you agree?

4 MR. MALONEY: We do, Your Honor. To the extent --  
5 and if we do feel that defense has opened the door to that  
6 topic, we'll certainly bring it up to the Court prior to  
7 inquiry.

8 THE COURT: The objection would be sustained. Thank  
9 you.

10 Motion to exclude testimony from those not present at the  
11 scene, narrating or commenting on what is depicted in the photo  
12 or video exhibits.

13 We covered this in our previous hearing. What I'm trying  
14 to communicate, we don't want to have some person who wasn't  
15 there tell us what is there. What I expect that the government  
16 will have, you will have people state, "I was there. That's  
17 me. That's the defendant. That's this. That's that."

18 Shawna Cox has been listed as a witness; is that correct?

19 MR. SUSSMAN: She is listed, Your Honor, yes.

20 THE COURT: Is she going to be called?

21 MR. SUSSMAN: Most likely not.

22 THE COURT: The issue, then, is to give continuity to  
23 the government's case that it would be helpful to the jury as  
24 long as it's not offering evidence to simply introduce this is  
25 the view from the fixed wings.

1 By the way, were they manned fixed wings or drones?

2 MR. SUSSMAN: They were manned aircraft, Your Honor.  
3 In fact, one of our witnesses is going to be one of the pilots  
4 who shot the video.

5 THE COURT: He will be able to introduce the video  
6 that he shot. The Cox video, I assume, can be -- it's already  
7 been stipulated --

8 MR. SUSSMAN: Correct.

9 THE COURT: -- that she took the videos that are  
10 offered, so all your -- the narration, I assume, would be just,  
11 "We are now showing X."

12 MR. SUSSMAN: Yes and no. It will not be an instance  
13 where we have someone narrating, "And this is Agent M and this  
14 is Officer 3 and this is the defendant." That's not the  
15 purpose of the narration.

16 What we were talking about, Your Honor, is to bring out  
17 certain details that might not be readily apparent to a casual  
18 viewer.

19 To point out, for example --

20 THE COURT: Who is on the witness stand?

21 MR. SUSSMAN: For example, with Frank Piazza, we can  
22 have him testify that he located frames in which debris is  
23 visible coming through the roof of the truck. Now, that's only  
24 a few fleeting frames, and that could easily be missed by a  
25 casual viewer. He's seen that many, many times and has gone

1 through it frame by frame, and he can point out the specific  
2 frames and point out the debris coming through the roof.

3 THE COURT: Have him do so.

4 MR. SUSSMAN: Right. That's the kind of narration we  
5 were talking about, not a running commentary.

6 On the infrared video, we were going to have someone talk  
7 about what the infrared video characteristics are because it  
8 looks a little different than your classic video, and we were  
9 going to talk about things like, you know, pointing out someone  
10 bending over to pick something up or looking underneath a  
11 vehicle, things like that, that may be difficult to see.

12 THE COURT: Well, you would have a witness, though,  
13 do that testifying. You know, "I was there. This is what I  
14 see." I'm not sure that -- who is going to say that? Who is  
15 going to -- let's take Piazza. Is he going to say, "Please  
16 notice that this officer is on his knees looking for  
17 something"?

18 MR. SUSSMAN: Probably not. It would probably be our  
19 case agent, Your Honor --

20 THE COURT: Oh.

21 MR. SUSSMAN: -- who's seen that video hundreds and  
22 hundreds of times.

23 THE COURT: I can't imagine, but close. All right.  
24 This is fairly innocuous.

25 MS. PERINI-ABBOTT: Your Honor, I think we're fairly



1 close with the government on this because the case law is clear  
2 that an agent who's watched the video numerous times can point  
3 out nuances that would be not caught by a casual observer. So,  
4 for example, the -- the described of it coming through the  
5 roof, what Frank Piazza testified, we don't object to that.

6 What we do object to is if it's visible on the video that  
7 somebody is bending down, the jury can see that someone is  
8 bending down, and the case agent is no longer offering helpful  
9 commentary. They're just offering running commentary on what's  
10 happening.

11 I think that that actually is the perfect distinction that  
12 the cases draw. The cases they cite of *Torralba-Mendia*, which  
13 we also set -- that sets forth this principle, and *Begay*, both  
14 involve the officers pointing out nuances in the video that are  
15 beyond what the jury would just see for themselves.

16 So while we think that they could have Frank Piazza  
17 testify that, for example, when the sparks come through, that's  
18 a nuance that the jury -- the jury wouldn't see on their own,  
19 they can't have a case agent say, "Now, look at the person  
20 bending down," because that's something the jury can simply see  
21 for themselves.

22 MR. SUSSMAN: But there may be other things, Judge,  
23 that the agent can point out to the jury that the jury wouldn't  
24 know.

25 THE COURT: Just ask the agent a leading question,

1 "Well, what do you make of this?" I don't know. It seems not  
2 prejudicial to anybody to just have a very brief continuity  
3 statement by the witness, and you can ask a leading question  
4 for clarification. Thank you.

5 MR. SUSSMAN: Thank you, Your Honor.

6 THE COURT: We're not going to have somebody looking  
7 at all this and then have a running narration.

8 So the objection is sustained, essentially, that there  
9 won't be any continuous statement by someone who wasn't there  
10 as to telling us what's there. That can be done through  
11 witnesses.

12 The other thing is that the government is -- all you need  
13 is to have the evidence in evidence by the time of your closing  
14 argument. You have -- you'll be replaying the key stuff that  
15 you think is important, and you'll be able to make your own  
16 statement. "Now, look, this is what they're doing. This is  
17 what you should infer they're doing. This is what they're  
18 doing now." You will cover all of that.

19 MR. SUSSMAN: But there may be some things,  
20 Your Honor, that I think the agent can testify to, that -- that  
21 we would need the agent to testify to, such as, for example,  
22 there are places in the video where you see what looks like  
23 someone swinging a rifle back and forth, and you can't tell  
24 what they're doing; but the agent, who's familiar with both  
25 infrared videography and tactical operations, can say what

1 they're doing is they are combing the area with the flashlights  
2 on the end of their rifles, and the rifle is slung right-handed  
3 or the rifle is slung left-handed.

4 THE COURT: And that's typical. What I said is  
5 innocuous. That's fine.

6 MR. SUSSMAN: Thank you.

7 THE COURT: All right. Now, the next thing is about  
8 the shooting stance. Again, all we're talking about is someone  
9 saying, "He was holding a rifle like this." To say, "He's  
10 holding this like a shooting stance," well, where's the harm?  
11 You know, you can have the witness say, "He's holding it like  
12 this," or you can say "He's holding in a shooting stance," it  
13 doesn't seem like that's prejudicial and that it's -- so they  
14 can describe what they saw, and you can leave out "was this a  
15 shooting stance?" You could just say, "What did you see?" And  
16 we'll leave it at that.

17 So the answer is the witness can testify and physically  
18 describe what the stance was, but we'll leave out the, quote  
19 "shooting stance." Again, I think it's not necessarily helpful  
20 one way or the other.

21 The jurors will understand what the person's movements  
22 meant.

23 Motion to exclude testimony. Restrictions on the second  
24 interview. HRT operators. My ruling is that will be  
25 dismissed, and at the -- your request, and that the -- I want

1 to make sure I say this correctly. It's still evidence that  
2 the government can offer what he said, whatever the second  
3 interview was. Do you want to state that for the record?

4 MR. MALONEY: Your Honor, I think we're conflate --  
5 we might have conflated two issues, and if we've confused the  
6 Court, we certainly apologize for that.

7 THE COURT: Maybe I'm confused. I should apologize.  
8 But, anyway, go ahead.

9 MR. MALONEY: The second interview objection --

10 THE COURT: The one I want is the one you agreed to  
11 dismissal as long as you could show what was said.

12 MR. MALONEY: These are the statements to Special  
13 Agent -- Supervisory Special Agent IM.

14 THE COURT: Count what?

15 MR. MALONEY: Count 2, Your Honor.

16 THE COURT: That's what I'm talking about.

17 MR. MALONEY: Count 2 is different from the second  
18 interview objection that counsel has brought.

19 THE COURT: Oh, wow. I am confused, then. I was  
20 confusing -- I was addressing the second count.

21 MR. MALONEY: So as to the second count, we conferred  
22 with defense counsel. We understand their concession now is  
23 that those statements relating to defendant's statements to  
24 Supervisory Special Agent IM are admissible and relevant to  
25 prove the other counts in the indictment.

1 THE COURT: Right.

2 MR. MALONEY: Accordingly, the government will move  
3 to dismiss Count 2.

4 THE COURT: That's dismissed. Thank you.

5 All right. Now let's go back to motion to exclude  
6 testimony. The second interview.

7 MS. PERINI-ABBOTT: Your Honor, maybe I can clarify  
8 what this motion is. Before the second interview, there is  
9 evidence that the government will put on. It's contested, but  
10 the government will put on evidence that Special Agent Astarita  
11 and two other agents put certain conditions on their  
12 willingness to be interviewed.

13 THE COURT: Oh, okay.

14 MS. PERINI-ABBOTT: We don't contest that the  
15 government can put on evidence that they wanted to be  
16 interviewed in a group and that it be unrecorded. We're not  
17 challenging that evidence being admissible.

18 We did challenge whether or not they could get into the  
19 fact that Special Agent Astarita be asked to be represented by  
20 counsel at that interview, and the government has conceded they  
21 have no intention of bringing up that evidence.

22 THE COURT: Good.

23 MS. PERINI-ABBOTT: So the only issue still to be  
24 decided on this motion is whether they can bring out the fact  
25 that Special Agent Astarita asked that he not be asked

1 questions he had been previously asked without first being  
2 given the right to look at his previous statements, and we move  
3 to exclude that basically on pure relevance grounds and 403  
4 grounds. It's simply not relevant because that right was  
5 afforded to every single law enforcement officer interviewed in  
6 this case. It's essentially a nonissue. Everyone was given  
7 that courtesy of being able to review their prior statements  
8 before being asked questions again. It's simply like asking to  
9 have heat on in the interview room. It's just not something  
10 that affects whether -- what happened in that interview, in  
11 terms of making it different from what the other interviews  
12 were in this case.

13 And the jury may infer some type of malintent or  
14 malfeasance in asking for it. And because the probative value  
15 is so low here, even that minor prejudicial value substantially  
16 outweighs the minor probative value here in this situation, and  
17 it should be excluded.

18 MR. MALONEY: Your Honor, the defense has made clear  
19 that they intend to challenge this as a biased and incompetent  
20 investigation. The conduct of the investigators, why they  
21 asked certain questions and didn't ask other questions is  
22 plainly going to be before the jury. The jury may well  
23 speculate that the -- the second interview was an incomplete  
24 interview and not know why the investigators didn't pose all  
25 these other questions to these witnesses collectively in this

1 group. We think that it is relevant. It is probative. It's  
2 directly responsive to one of the attacks on the investigation.  
3 We ask that you deny the motion.

4 THE COURT: Anything further?

5 MS. PERINI-ABBOTT: I would just say that we don't  
6 intend to specifically attack whether or not they asked certain  
7 questions in the second interview, and if we did open the door  
8 by raising such a specific question, then an answer like that  
9 could come in, but it's not probative in the initial stance.

10 THE COURT: Okay. Thank you. It's innocuous. It's  
11 not prejudicial to either side. It will be allowed.

12 So the motion is denied.

13 The motion to exclude reference to anonymous facts, that's  
14 stipulated; is that correct?

15 MR. SUSSMAN: That is correct, Your Honor. We are  
16 not planning to introduce any evidence on that.

17 THE COURT: That's granted.

18 Motion to exclude evidence that certain text and email  
19 messages from HRT operators were not retained.

20 The government -- I have a note the government will elicit  
21 testimony that the evidence is missing but will also make it  
22 known that the failure to retain the messages is not  
23 attributable to the defendant or HRT.

24 Would you like to be heard?

25 MR. CARY: Yes, Your Honor. We're very concerned

1 that that is prejudicial to Agent Astarita, that there will be  
2 some notion or inference that the jury may draw that that is  
3 some sort of conspiracy by the FBI, and in today's age, with  
4 all the accusations in the media about the FBI, we think it's  
5 very unfair, and we also think it's time-consuming and not  
6 something we ought to be wasting our time with.

7 THE COURT: I don't think it has any relevance to  
8 what we want. It will be granted.

9 Parties in the court --

10 MR. SUSSMAN: Your Honor, if I may, on that? Once  
11 again, we just heard counsel a moment ago talk about this being  
12 an incomplete and biased investigation.

13 THE COURT: I heard it, but I'm not buying it. We're  
14 not going into testimony that this is a biased investigation.  
15 I will hear offers of proof and so forth. I have no intention  
16 of clouding up the great issue on this case. Did he fire the  
17 weapon? Did he lie about it? That's where we're going to keep  
18 it.

19 MR. SUSSMAN: I guess the government is concerned,  
20 Your Honor, that the jury might be left wondering why didn't  
21 they check his text messages? Why didn't they check his email  
22 messages? We want to be able to tell them we tried.

23 THE COURT: They won't even get an opportunity to  
24 submit that to the jury.

25 So the parties and Court should not describe expert



1 witnesses as "expert." We've already covered that, but I -- we  
2 give the expert testimony and expert testimony instruction  
3 where you use the term "expert."

4 What I don't allow is to have a witness say, "Well, I was  
5 described as an expert by Judge Brown or Judge Simon or Judge  
6 So and So." That's not going to be allowed. But if the  
7 parties -- you know who you're calling as experts. You can  
8 refer to them, but that doesn't -- I'm not going to anoint --  
9 tell them that they're an expert or that they're qualified to  
10 testify as a, quote, "expert." You won't hear that.

11 So that's granted to that extent.

12 Now, the questionnaire is resolved.

13 The next thing I have are exhibits. I have the government  
14 challenges to defense exhibits. How many exhibits is the  
15 government offering?

16 MR. SUSSMAN: Your Honor, I believe we have 263  
17 exhibits on our exhibit list.

18 THE COURT: Thank you.

19 And the defense, roughly?

20 MR. FRANCIS: Your Honor, it's roughly -- it's  
21 roughly 900 or 1,000. But the vast majority of those are  
22 photographs. I would say 80 to 85 percent of those are  
23 photographs.

24 THE COURT: Well, they're still exhibits, but they --  
25 so let's look at -- we'll go through.

1 Now, I hope I made it clear that at final pretrial  
2 conference we settle all exhibit issues. They are offered, and  
3 we don't -- if there's any question about authentication, it  
4 has to be done during final pretrial conference, not in front  
5 of the jury.

6 So I need to talk about what are the exhibits that are not  
7 going to be admitted.

8 Now, there was testimony -- there was objections that the  
9 defense was going to offer excerpts from 60 Minutes and from  
10 other videos and other media about the grueling training that  
11 these HRT operators go through. I now see that this has been  
12 reduced to nine still photographs demonstrating various HRT  
13 training exercises.

14 Now, first of all, we're not going to have portrayals --  
15 and it's not even offered anymore -- about 60 Minutes and other  
16 matters of the HRT and their heroics and so forth.

17 I would assume the defense has considered -- I mean, the  
18 prosecution has considered, as to any objection, as to the  
19 training of the HRT, is that this may work in the government's  
20 favor because any trained HRT operator who's in a shooting  
21 environment is going to give a straightforward answer, not use  
22 ambiguous responses, and that they would automatically turn  
23 their weapons over for inspection if they are following their  
24 grueling training and their operation procedures.

25 But you're objecting to it, so let's clarify what you are

1 objecting to.

2 MR. SUSSMAN: Well, Your Honor, we're not objecting  
3 to testimony that HRT -- that the HRT selection process is  
4 difficult and that they go through a tremendous amount of  
5 training. What we do object to is exhibits showing people  
6 rappeling down the face of a waterfall, skydiving, people  
7 standing around.

8 THE COURT: Are these in the nine photographs?

9 MR. SUSSMAN: Yes, they are, Judge, and I can tell  
10 you exactly which one it is. Defendant's 2336. They are  
11 rappeling down the cliff face of a waterfall.

12 MR. CARY: I don't mean to interrupt. We can save  
13 everybody some time. We'll withdraw those nine exhibits.

14 THE COURT: Thank you. Thank you.

15 Now, we will have the Finicum truck here for the  
16 government?

17 MR. MALONEY: Yes, Your Honor. We intend to use  
18 that.

19 THE COURT: It will be down in the sallyport?

20 MR. MALONEY: Yes, Judge. Does the Court require an  
21 order, to that effect, for a jury view?

22 THE COURT: I thought -- I don't require, but maybe I  
23 should --

24 MR. MALONEY: I can file a written motion requesting  
25 a jury view.

1 THE COURT: -- for the marshals.

2 Is the marshal going to bring it over?

3 MR. MALONEY: No, Your Honor. I believe Deschutes  
4 County Sheriff's Office is going to be conducting the  
5 transport.

6 THE COURT: Do you need anything further than my  
7 order on the record?

8 UNIDENTIFIED SPEAKER: No, Your Honor.

9 MR. SUSSMAN: The only thing we're not sure of, I  
10 guess, is whether the marshals will require the Court's  
11 authority.

12 THE COURT: I'll sign whatever is needed.

13 MR. SUSSMAN: Thank you.

14 Your Honor, just for clarity's sake, those nine exhibits  
15 are not the only ones the government is objecting to. I don't  
16 know when you want to take up objections to other exhibits.

17 THE COURT: I'll take any other objections the  
18 government has to defense exhibits, yeah.

19 MR. SUSSMAN: All right. Well, there's a number of  
20 them, and I don't know the easiest way do this, but I guess  
21 we'll just go exhibit by exhibit.

22 As a general matter, the defense has marked as exhibits a  
23 number of police reports. Now, we're in -- now, the authors of  
24 those reports are also on the defense's exhibit -- or witness  
25 list, and some of them are also on the government's witness

1 list.

2 Now, if those witnesses testify, of course, their reports  
3 would be cumulative to their testimony. So to the extent that  
4 the officers or agents testify to the matters in the reports,  
5 we would object to the reports as being cumulative under  
6 Rule 403.

7 In addition, there's some hearsay issues with them.  
8 There's personal identifiable information in a number of them.  
9 There's a lot of problems with a lot of these reports.

10 For example, we've got the improper opinion testimony  
11 which we continue to -- you know, with respect to Defendant's  
12 Exhibit 2002. That's Wes Murphy's report.

13 In 2004, there's a lot of personal identifiable  
14 information in there. There's also a complete list of all of  
15 the items of evidence seized by the Deschutes County Sheriff's  
16 Office. I'm not sure how that is relevant.

17 In 2005, Supplemental Report No. 1 contains hearsay.

18 2006 is okay, but it's probably cumulative if Deputy Zilk  
19 testifies.

20 2007, they've listed certain things as being redacted. We  
21 would need to see what the redactions are before we can --

22 THE COURT: Well, before we go further, have you met  
23 and conferred over these objections?

24 MR. SUSSMAN: Not specifically. No, Your Honor.

25 THE COURT: Well, that's required. How many more do

1 you have?

2 MR. SUSSMAN: Quite a few.

3 THE COURT: We're going to take our morning recess.  
4 I'll require counsel to meet and confer, and we'll see where --  
5 what timing we have for that.

6 MR. SUSSMAN: Okay.

7 THE COURT: But I try to make clear in final pretrial  
8 conference that you are to meet and confer over exhibits so  
9 that I have a list of precisely what exhibits are offered and  
10 whether you met and conferred and whether there was any  
11 objection; and, if so, the objections, so I can make a measured  
12 response. I don't have that.

13 I'm getting something that a report may have hearsay.  
14 Well, as you know, police reports can qualify as either  
15 business records or as public records under 803.6 and 803.10.  
16 And as far as evaluative reports as to what is admissible and  
17 what is not, you are all very familiar with that.

18 So I'm going to need exhibits as to what you agree to and  
19 what you don't agree to, and, I don't know, we might have to  
20 defer that until tomorrow. So we'll see.

21 We'll take a recess now for 15 minutes.

22 (Recess taken.)

23 THE COURT: Good afternoon. Have a seat.

24 MR. ANGELI: Good afternoon, Your Honor. I'm pleased  
25 to report some progress on the exhibits.

1 THE COURT: Fine.

2 MR. ANGELI: May I be seated to walk through some of  
3 this?

4 THE COURT: Please do.

5 MR. ANGELI: Okay. Your Honor, with respect to some  
6 of the defense exhibits, first, the defense has agreed to  
7 withdraw certain exhibits, and, with the Court's permission,  
8 I'll walk through those.

9 THE COURT: Put them on the record.

10 MR. ANGELI: We've agreed to withdraw Exhibit 2004,  
11 2010, 2012, 2016, 2017, 2025, 2026, 2027, 2036, 2046, 2048,  
12 2066, and 2336 through 2344. We've also agreed, Your Honor --  
13 Exhibits 2028 through 2034 are learned treatises, and we've  
14 agreed that those exhibits themselves, pursuant to the rule,  
15 will not go back to the jury but that we may read excerpts of  
16 them from the record, pursuant to the rule.

17 THE COURT: That's fine.

18 MR. ANGELI: We've agreed, Your Honor, to redact the  
19 handwritten notes from Exhibits 2062 and 2063.

20 And then with respect to -- as Mr. Sussman was explaining  
21 to the Court, many of our exhibits are police reports, and the  
22 parties have agreed that those exhibits will come in but that  
23 the defense will redact hearsay. So if the report says, "I  
24 heard from Officer X" something, we'll redact the hearsay, and  
25 we'll also redact any personal identifying information --

1 telephone numbers, addresses, and the like -- for officers.

2 THE COURT: Okay.

3 MR. ANGELI: I think, Mr. Sussman, did I miss  
4 anything?

5 MR. SUSSMAN: Your Honor, just as a minor matter,  
6 there are some questions as to one of the exhibits. I think it  
7 may be 2044. I think the parties need to do a little bit more  
8 research into that. I think there may have been a page put in  
9 the wrong place.

10 There's also another exhibit that had a missing  
11 attachment that we're trying to run down.

12 And with respect to a couple of -- a couple of -- a couple  
13 of their exhibits, one is an analytical report from  
14 Tori Dickerson, from the state police crime lab, which is their  
15 Exhibit No. 2056; and then there's also some field notes that  
16 she took that have been redacted as well. The parties have  
17 discussed the fact that the redactions have to do with the  
18 trajectory calculations that she did in this case. The defense  
19 redacted that because they felt compelled to do that in order  
20 to preserve their objections to the admissibility of that  
21 testimony.

22 However, we pointed out that if they seek to introduce  
23 those exhibits as currently redacted, that the government will  
24 be seeking to introduce the full unredacted versions under the  
25 rule of completeness.



1 THE COURT: Fine.

2 MR. SUSSMAN: And then, Your Honor, one other issue  
3 is with respect to Defense Exhibit 2051. That is the key, the  
4 code key, for the officers' names. That's going to have some  
5 redaction done to it. But the parties were discussing that it  
6 would be beneficial if there was a way that the key could go  
7 back to the jury without being a part of a publicly available  
8 record. I don't think the parties had an objection to the key  
9 going back so long as some of the reports that require it go  
10 back to the jury, but we're just concerned with maintaining  
11 officer confidentially in a broader, sort of, public context.

12 THE COURT: It will be retained as you suggest.

13 MR. SUSSMAN: I think that's it for the defense  
14 exhibits, Your Honor.

15 THE COURT: All right. Now does that mean the  
16 remainder of the exhibits will be received without objection?

17 MR. SUSSMAN: Well, what we were talking about before  
18 Your Honor was -- we were going to suggest that the Court  
19 conditionally receive the exhibits, such that if they were  
20 actually used in connection with witness testimony, shown to a  
21 witness on the stand, then those exhibits that were used with a  
22 witness or shown to the witness while on the stand would go  
23 back to the jury; and if an exhibit was not used with or shown  
24 to a witness, then it would not.

25 THE COURT: We call that the Judge Marsh rule. He

1 kept a record once of all exhibits that had been received and  
2 nobody ever paid any attention to them or mentioned them again,  
3 so of course. That makes good sense, practical sense. If  
4 you're going to use it, fine; if you're not going to use it,  
5 then it doesn't go in.

6 MR. SUSSMAN: I mean, between the two of us, there's,  
7 what, 1,100 exhibits, almost 1,200 exhibits.

8 THE COURT: Yes.

9 MR. SUSSMAN: I don't think anybody is intending for  
10 that size of a pile to go back to the jury room.

11 THE COURT: All right. That's fine. Anything  
12 further on the exhibits?

13 MR. SUSSMAN: I was going to say not on the defense  
14 exhibits, I don't think; but there are some objections to, on  
15 the part of the defense, to some of the government's exhibits.

16 MR. FRANCIS: Thank you.

17 Your Honor, turning to the government's exhibit list,  
18 these fall under a couple of different categories, so I want to  
19 start with a number of objections that we have. We  
20 discussed -- everything I'm about to share with the Court we  
21 discussed with the government already.

22 These are objections that we have to the government's  
23 exhibits that we're making for reasons that we have already  
24 articulated in previous motions. The Court has ruled on these  
25 issues already. We're preserving our objection.

1 THE COURT: Yes. Well, the rulings that I made, you  
2 don't have to raise again in front of the jury or even now, as  
3 far as the *Daubert* rulings; but as far as any rulings today, I  
4 said they all will be definitive rulings. You don't have to  
5 raise them in front of the jury to preserve your record.

6 So that's where we are on what you have to object to to  
7 preserve your record.

8 MR. FRANCIS: Yes, Your Honor. What I'm specifically  
9 doing is linking up those rulings to specific exhibits. We  
10 have specific objections. We have not made a record on our  
11 objections to these exhibits for the --

12 THE COURT: Go right --

13 MR. FRANCIS: -- reasons the Court has already  
14 stated.

15 These are for -- these have to do with the Motion in  
16 Limine No. 1 from the defense, the shell casings issue.

17 THE COURT: Yes.

18 MR. FRANCIS: On that basis, we object to Exhibits 2  
19 and 3, in part, to the extent that they're used to depict or  
20 argue anything regarding the missing shell casings issue that  
21 we were discussing this morning and also Exhibit 16, in its  
22 entirety, for the same reason.

23 THE COURT: That's overruled, as I've stated.

24 MR. FRANCIS: As to certain exhibits being used in  
25 connection with Mr. Piazza, and this is Exhibits 6 through 15

1 and 17 through 20, we object to these documents for the reasons  
2 that we've stated in our *Daubert* motion against Mr. Piazza;  
3 namely, that these are enhanced videos with no record of what  
4 he did to these videos to enhance them.

5 THE COURT: I'll adhere to my prior ruling.

6 MR. FRANCIS: And to exhibits relating to  
7 Victoria Dickerson, Exhibits 98, 99, and 100, we object to  
8 these as they depict trajectory measurements using the  
9 centering cone method for the reasons we articulated during the  
10 *Daubert* hearing.

11 THE COURT: I reiterate my ruling.

12 MR. FRANCIS: As to exhibits pertaining to  
13 Michael Haag -- Exhibits 134, 138, 140, and 141 -- these  
14 exhibits all depict Haag's trajectories using the rocker  
15 method, and we object for the reasons previously stated.

16 THE COURT: Same rulings.

17 MR. FRANCIS: As to Mr. Turpen, Deputy Turpen,  
18 Exhibits 129 through 132, we object to these exhibits for the  
19 reasons we raised during the *Daubert* hearing and that  
20 Mr. Turpen admits that his techniques meet literally none of  
21 the *Daubert* factors.

22 THE COURT: Same ruling.

23 MR. FRANCIS: As to Mr. Terpstra, now, many of the  
24 government's exhibits, in general, fall into this category. We  
25 object to all of them for the reasons we articulated during the

1 *Daubert* hearing. Those exhibits are -- and I apologize. It's  
2 a lengthy list -- 36 through 46, 50 through 52, 165 through  
3 167, 169 through 171, 173 through 175, 177 through 179, 181 to  
4 184, 186 through 189, 191 through 193, 195 through 197, 199  
5 through 202, and 204 through 246. So we object to all of those  
6 on the grounds that we previously argued during the *Daubert*  
7 hearing.

8 THE COURT: I adhere to my prior rulings.

9 MR. FRANCIS: Now, we have another set of issues with  
10 Terpstra's exhibits. These fall into a different category. We  
11 are seeking a ruling from the Court today on the issue I'm  
12 about to outline.

13 THE COURT: Fine.

14 MR. FRANCIS: These exhibits we strongly believe do  
15 not and, frankly, cannot comply with the Court's *Daubert* order  
16 that it did issue.

17 So this is the issue that we raised in our trial memo  
18 regarding exactly what the government is trying to do in  
19 response to the Court's *Daubert* order. We had some concerns  
20 about this based on what was produced to us during discovery by  
21 Mr. Terpstra after the *Daubert* order. And now that we've seen  
22 what has been designated on their exhibit list, we felt we  
23 needed to bring this to the Court's attention right away.

24 I brought some of these to show to the Court, which I  
25 think I'm set up here to do. It's a lot more helpful to show

1 you what it is we're talking about than to try to describe it  
2 to you.

3 THE COURT: I've been told that Terpstra has revised  
4 his material.

5 MR. FRANCIS: He has done so, Your Honor.

6 THE COURT: Is that what I'm looking at?

7 MR. FRANCIS: I'll be clear about what you're looking  
8 at, but a portion of what I'll be showing you are exhibits that  
9 were designated by the government and that come from revised  
10 work that Mr. Terpstra has done after the *Daubert* hearing.

11 THE COURT: Okay.

12 MR. FRANCIS: Just so the record is clear on this,  
13 I'm going to be discussing one set of images, but the arguments  
14 I'm making apply to an entire category of exhibits that are  
15 substantially similar. So I would like to talk about this set  
16 as an example, and, then, at the end, I will go into detail  
17 about exactly what exhibit numbers we feel suffer from the same  
18 problem.

19 So, Your Honor, what I'm showing the Court now is from  
20 Mr. Terpstra's original report prior to the *Daubert* hearing.  
21 This is what they started with.

22 THE COURT: If you folks want to see these things,  
23 you can go to the jury box and see it on the screens.

24 I think it's set up, isn't it, Becky?

25 DEPUTY COURTROOM CLERK: It depends how they're

1 projecting it.

2 THE COURT: Maybe they're not interested. I don't  
3 know.

4 Don't be shy, folks. Just you came from -- you get up in  
5 the jury box. Go on. Go on.

6 Thank you. All right.

7 MR. FRANCIS: All right.

8 THE COURT: This is a revised --

9 MR. FRANCIS: No, Your Honor. This is what they  
10 started with. This is what was in Mr. Terpstra's original  
11 report prior to the *Daubert* hearing.

12 THE COURT: Okay.

13 MR. FRANCIS: This is what they want to show to the  
14 jury. This is Exhibit 214 from the government. This is  
15 Exhibit 214, by comparison. They want to go from this, the  
16 original exhibit, to this.

17 THE COURT: Okay.

18 MR. FRANCIS: As a general matter, Your Honor, the  
19 defense does not believe that this is in any way compliant with  
20 the Court's order on what Mr. Terpstra is and isn't allowed to  
21 do by placing individuals into this scene.

22 Going from this, which is the original lineup of people  
23 from Mr. Terpstra's report, to this, which is  
24 Government Exhibit 238, does not solve the problem and does not  
25 comply with the Court's order that Mr. Terpstra's methodology

1 cannot accurately place the location of the individuals.

2 Taking their arms off and removing the legs of some people does  
3 not solve the problem.

4 Now, this is Government Exhibit 30. This is a still frame  
5 from the FBI video. If they want to show this to a witness and  
6 have -- I'm going to zoom in on it here. If they want to show  
7 this zoomed-in version of Exhibit 30 to a witness and have them  
8 identify where they are in this picture --

9 THE COURT: We have to lower it.

10 MR. FRANCIS: I can't, unfortunately, Your Honor.  
11 This is a screen -- a screenshot of it zoomed in.

12 THE COURT: All right.

13 MR. FRANCIS: So if the Court will focus on this  
14 area, on this -- on this area right here and try to -- you  
15 know, we have the fuzzy splotches here, the fuzzy smudges, from  
16 the video. They don't want to show -- the government does not  
17 want to show this exhibit to the witness and have them show  
18 their location. They want to show this exhibit, which is a  
19 zoomed-in version of Exhibit 41, to a witness and have them --  
20 take this image, which shows where Mr. Terpstra has placed  
21 these people, and have the witnesses identify which of these  
22 Mr. Terpstra positions corresponds to them.

23 THE COURT: Go back. The blue is defendant?

24 MR. FRANCIS: Correct.

25 THE COURT: Well, that --



1 MR. FRANCIS: It's, of course, not just --

2 THE COURT: Just leave it there for a minute. That  
3 can't be lowered?

4 MR. FRANCIS: I can zoom it out so we can see  
5 everything, Your Honor, and I have a picture that's going to  
6 get to that in a moment.

7 And I -- I'm focusing here on the other two individuals,  
8 besides the defendant, just -- just for clarity's sake.  
9 Your Honor, it's not only the position of the defendant that is  
10 the issue here. It's the position of everyone who is -- who is  
11 in this scene.

12 THE COURT: All right. Go ahead.

13 MR. FRANCIS: So, again, the Court -- the Court's  
14 ruling, as we understand it, makes it clear that Mr. Terpstra  
15 can use camera matching and photogrammetry to place the  
16 vehicles. And if they want to overlay a trajectory even on top  
17 of that, that's coming out from Mr. Finicum's truck, that's  
18 fine too. That's in compliance with the Court's order. And  
19 then if they want to take a scene, if they want to zoom in on  
20 it and ask witnesses, "All right. Where were you at the time  
21 that Mr. Finicum got out of the truck?" and have them identify  
22 their positions in a scene like this that has Mr. Terpstra's 3D  
23 vehicles, that's one thing; but to start with their finger on  
24 the scale by having Mr. Terpstra place those people into the  
25 positions that Mr. Terpstra believes that they are using camera

1 matching and photogrammetry, we do not believe that that is in  
2 compliance with the Court's order.

3 Our understanding of what they want to do here is to take  
4 an image like this and show it to the jury and show it to the  
5 witness, have the witness identify, "Hey, where are you in this  
6 image?" A better example of a leading question, I cannot think  
7 of, because they've already placed the people into this image  
8 before they show it to a witness. The witness is going to, I  
9 guess, guess where these people are, and eventually they're  
10 going to come up with an image that looks like this.

11 This is Government's Exhibit 41, with Mr. Terpstra's  
12 positions for each of these people as Mr. Terpstra placed them.  
13 Just having a -- showing this to a witness and having a witness  
14 say, "Yep, looks good to me," does not address the Court's  
15 concern that Mr. Terpstra's methodology cannot accurately place  
16 the location of the vehicles. There's the reason -- "of the  
17 people." Excuse me. I said "of the vehicles."

18 Now I want to talk about why this is a problem. We're not  
19 just fighting about how someone can indicate people on this  
20 video what shape of circle or what color of circle they used.  
21 The question is who gets to place these people and what does  
22 Mr. Terpstra get to say to the jury about what those positions  
23 mean? What they want to do is have Mr. Terpstra place the  
24 people and then testify that those are the true, correct, and  
25 accurate positions of those people.

1 People that were placed using photogrammetry and camera  
2 matching, that's exactly what this Court said they weren't  
3 allowed to do. Only by taking the position of these people as  
4 accurate, is Mr. Terpstra then able to throw them into his  
5 model and move the camera around so he can show the jury  
6 pictures like this -- this is Government Exhibit 243 -- or  
7 this, Government Exhibit 241; or this, Government Exhibit 240.

8 There are no photographs like this. There is not even a  
9 fuzzy smudge that corresponds with this angle or the previous  
10 one, 241, or the previous one, 243. There's no video frame,  
11 fuzzy smudge, or otherwise, that shows anything from this  
12 angle. This is entirely computer generated.

13 You can't generate this image unless Mr. Terpstra is  
14 permitted to use camera matching to, quote, accurately place  
15 the location of the individuals into his model. Again, that's  
16 exactly what the Court said he couldn't do.

17 If you want to switch views, switch positions, get away  
18 from the ariel overhead FBI plane view and switch to a top-down  
19 view, for example, or an over-the-shoulder view, the only way  
20 to do that is to do something like this. This is Exhibit 237.

21 Now, this does comply with the Court's order. This is,  
22 again, a view that doesn't exist anywhere in photography.  
23 There is no video frame that shows this image. This is also  
24 entirely computer generated. But unlike the other images I've  
25 shown you already, this only has the trajectory and it only has

1 the trucks. That complies with the Court's ruling.

2 If they want to show this to a witness and have them draw  
3 an X, "I was here," illustrate their testimony by saying, "I  
4 started out over here and then I moved in some fashion as  
5 things developed," that would be one thing; but they want to  
6 show this picture to the jury instead: Exhibit 245.

7 Again, this has Mr. Terpstra's positions for these people,  
8 not the positions that these eyewitnesses would place  
9 themselves in, and we know exactly what the government wants  
10 Mr. Terpstra to say about this from their trial memo.

11 The government's trial memo, on page 13, "Mr. Terpstra,"  
12 quote, "applied camera matching photogrammetry techniques to  
13 position the vehicles, personnel, and trajectory measurements."

14 Further down the page, quote, "Mr. Terpstra created  
15 visualizations to illustrate the movements and the positions of  
16 the people."

17 Finally, quote, "The model clearly shows that the  
18 defendant is the only person within the point of origin for the  
19 bullet that caused impact W."

20 That is not illustrating the testimony of an eyewitness,  
21 which the Court said the government could do, but that is  
22 Mr. Terpstra purporting to testify that his methodology can  
23 accurately place the location of the individuals. That is  
24 precisely what the Court said he couldn't do. That's the only  
25 way that Mr. Terpstra can say, "I know who is in the cone and

1 who is not in the cone."

2 As I said, Your Honor, I've shown one sequence of -- I've  
3 shown a sample of images. I have a list I can share with the  
4 Court as we move further into this argument of all of the  
5 exhibits that are infected with this same problem.

6 THE COURT: Let's stop here and have the government's  
7 response.

8 MR. MALONEY: Yes, Judge. If we could -- if we can  
9 take control.

10 Judge, what the government attempted -- the government did  
11 was, in an effort to comply with the Court's order and to  
12 address some of the issues that came up with Mr. Terpstra's  
13 testimony during the *Daubert* hearing, was to take multiple  
14 frames from the FBI overhead video and apply those camera  
15 matching techniques, the same ones that Mr. Terpstra testified  
16 to during the *Daubert* hearing, to multiple frames of video, all  
17 surrounding the time of shot "W" as identified by  
18 Mr. Frank Piazza.

19 So what you see here, Your Honor, in the side-by-side view  
20 on your viewer screen, is Government Exhibit 26 and 37.  
21 Government 26 is the overhead video. Government 37 would be an  
22 exhibit that will help the -- help the jurors understand the  
23 scene, help the witness to be able to demonstrate and  
24 illustrate their testimony as to who was positioned where. The  
25 witnesses will be asked whether that is fair and accurate to

1 their recollection of the positions of the individuals at the  
2 time that Mr. Finicum got out of his truck.

3 As the Court saw throughout the *Daubert* hearing, this  
4 whole incident took place in those seconds as Finicum got out  
5 of the truck, and that's what we've tried to capture here.

6 The next file in sequence.

7 So that was 26 and 37.

8 Here should be 27 and 38. You'll notice the figures have  
9 moved further along the timeline of events. Again, this is  
10 going to be used to demonstrate and illustrate the movement of  
11 the individuals at or near the time Mr. Finicum got out of his  
12 truck. The colors are being applied so that it is clearer so  
13 that the individuals can identify themselves and, to the extent  
14 that they are able, to identify the other operators present and  
15 moving through the scene.

16 Next figure, please.

17 THE COURT: All right.

18 MR. MALONEY: We have a whole sequence of these. So  
19 we're showing multiple things with this and demonstrating not  
20 only just where they were at a certain point in time, but the  
21 sequence demonstrates the movement through the scene, which is  
22 probative and illustrative to the witness's testimony, and  
23 these images help to explain their testimony and make things  
24 clearer for the jurors.

25 Then we have Mr. Terpstra testify later in the case to

1 explain both the vehicles and the camera matching technologies  
2 that he used for the placement of the vehicles and the  
3 trajectories. And to the extent that the witnesses are able to  
4 identify where they were in the frames that we've demonstrated  
5 for the Court, Mr. Terpstra will explain how he was able to  
6 create these images that are in 26 and -- 26 and 37, 27 and 38,  
7 and pair those images for the jury to explain what the 3D model  
8 was able to create in terms of the demonstrative evidence.

9 If the Court is convinced that the government has met its  
10 burden by a preponderance that we have now demonstrated that  
11 the images from the 3D model and the 3D model are relevant and  
12 reliable, we would ask the Court to reconsider the *Daubert*  
13 hearing in light of the new eyewitness testimony and to admit  
14 those exhibits.

15 In the absence of that, we still are within the ruling of  
16 the Court to use those as demonstrative aids with the  
17 witnesses, to explain how they -- how these images were  
18 generated within the 3D model, and to show Mr. Terpstra's  
19 manner in which he placed them.

20 I agree with counsel insofar as if the witnesses can't say  
21 that that is fair and accurate to where they were, that  
22 Mr. Terpstra's model would be limited to just the vehicles and  
23 the trajectories. But there's a critical component that we're  
24 trying to harmonize with the Court's previous ruling, and that  
25 is factoring in the eyewitness testimony.

1           We believe that these exhibits help demonstrate and  
2 illustrate their testimony and will be helpful to the jury in  
3 that regard. To the extent the government has laid sufficient  
4 foundation for admissibility based upon Mr. Terpstra's  
5 testimony and the testimony of the eyewitnesses, we would ask  
6 the Court to consider admitting them all in full. In any  
7 event, we can still use them, in part, as demonstrative  
8 evidence.

9           THE COURT: All right. In respect to this matter,  
10 you can still use the left screen and have the witness  
11 identify, "Can you find yourself on this screen?" The witness  
12 find on the stand. And I assume that in preparation for the  
13 testimony, that you can use anything to refresh memory. If you  
14 remember what we used to say, you can use a ham sandwich to  
15 refresh memory.

16           Anyway, the -- so you start with the one on the left and  
17 say, "Please mark where you were, if you know, on that screen,"  
18 and I assume the witness will be able to do that. If so, all  
19 they have to do is circle it. On the other hand, if your  
20 witness breaks down, then I have -- I think it might be -- I  
21 think it's a close question as to whether you can show them the  
22 right screen and say, "Does that refresh your memory?" And at  
23 that point they can say, "Yeah, that's me." That is now  
24 verified. It's not Terpstra. It's now verified as to whether  
25 they can identify where they are.



1 But it will not come in as Terpstra saying this is X, Y,  
2 Z. Is that clear?

3 MR. FRANCIS: That makes sense to us, Judge.

4 THE COURT: Fine.

5 MR. MALONEY: Just so the -- are we able to use the  
6 right-hand screen with the witness?

7 THE COURT: Not unless -- you start off, you'll use  
8 the left-hand screen. The witness should be, with proper trial  
9 preparation, be able to identify themselves. "Would you please  
10 just use your finger and circle where you are on that screen?"  
11 And that's all you need.

12 The position of the vehicles -- trucks, cars, et cetera --  
13 are not in dispute.

14 So if they can't do that, then -- I'm considering it --  
15 you put the other screen up and say, "Does that refresh your  
16 memory?" But "Where were you?" and not "Is that you?"

17 MR. MALONEY: Understood, Your Honor.

18 MR. FRANCIS: Your Honor, if I could make a clear  
19 record, since we're referring to the left side and right side  
20 of the screen here? So the left side of the screen, which, as  
21 we're currently looking at it, is Government's Exhibit 28, this  
22 image and the other images similar to it, we have not objected  
23 to any of those exhibits.

24 THE COURT: Right.

25 MR. FRANCIS: The image on the right side --

1 THE COURT: Would you give us the number?

2 MR. FRANCIS: That's Government Exhibit 28.

3 THE COURT: Thank you.

4 MR. FRANCIS: The image on the right side of the  
5 screen currently displayed is Government's Exhibit 39. That  
6 image is -- just to describe it, is the view from the FBI video  
7 with Mr. Terpstra's trucks and outlines overlaid on top of it.

8 As I indicated a few moments ago, Your Honor, I have a  
9 list of all the government's exhibits which are similar to the  
10 right side of the screen which use these outlines. Those  
11 exhibits are Exhibits 36 through 46, 50 through 52, 208 through  
12 222, 223 through 236, portions of a video marked as  
13 Government's Exhibit 207, and Exhibits 239 through 246.

14 THE COURT: Thank you. So I hope that we now -- the  
15 preference, to keep this accurate, is to have the witness take  
16 the original exhibit and circle where they were or where  
17 anybody else was. It might take two or three witnesses to  
18 identify people. If that doesn't work, you can use the other  
19 one to refresh memory to see if they have it, and you just ask  
20 the question, "Does that refresh your memory?" And if so,  
21 "Where were people, if you know?" And they can verify it that  
22 way. But it's not coming in as Terpstra's interpretation of  
23 where they were. That's his credibility. We have to have the  
24 witness's credibility at stake. That's what it is. I don't  
25 think we need to discuss that further.

1 MR. FRANCIS: Thank you, Your Honor.

2 I have several final matters as regards to the  
3 government's exhibit list.

4 Exhibit 134, we raised a different objection to this  
5 earlier, but we also object to Exhibit 134 on the grounds that  
6 it represents Michael Haag's entire report. Mr. Haag will  
7 testify his report is hearsay.

8 I don't know if we want to --

9 THE COURT: Do you have a response?

10 MR. MALONEY: Judge, you know, we're in a spot where  
11 we're putting in all kinds of different expert reports. We  
12 thought that -- the government's position was if  
13 Ms. Dickerson's report is coming in, in part, but then  
14 eventually it's going to come in under the rule of  
15 completeness, Mr. Haag's report, as it dovetails off of hers,  
16 takes her information and refines it, would be admissible to  
17 explain that.

18 We can do it through his testimony. We just thought that  
19 was going to be a cleaner way to do it so that the jury  
20 wouldn't have questions, in their mind, as to why we have  
21 reports from one expert and not the other.

22 THE COURT: So what's before the Court?

23 MR. FRANCIS: Your Honor, Victoria Dickerson's  
24 report, as we've -- as we've offered it, doesn't contain any  
25 expert testimony in it. It's her observations and her

1 measurements.

2 THE COURT: Measurements, right.

3 MR. FRANCIS: Right. Her observations and the  
4 measurements, to the extent they're not -- they don't require  
5 her expertise. So our position is still that Mr. Haag's report  
6 is hearsay. And if they're going to put that on, they need to  
7 put it on through his testimony.

8 THE COURT: Well, Haag will be testifying about the  
9 contents of his report, won't he?

10 MR. MALONEY: He will, Your Honor.

11 THE COURT: And then his report would be cumulative.

12 MR. MALONEY: As would Ms. Dickerson's.

13 THE COURT: Yes. So the testimony is what counts.  
14 Not the reports that they had made for pretrial discovery or  
15 for the *Daubert* hearing. So the reports -- if there's an  
16 objection to the reports themselves, they don't come in. But I  
17 can't tell what you've agreed to and what you haven't at this  
18 point.

19 I'll ask the defense which reports do you admit should  
20 come in as helpful and which ones do you object to as  
21 cumulative?

22 MR. ANGELI: Your Honor, we don't think any expert  
23 reports should come in. And the document of Ms. Dickerson's  
24 that we offered is not her expert report. Before she offered  
25 any expert opinions in this case, she was an investigator.

1 THE COURT: The reports generally do not come in.  
2 It's the testimony that comes in.

3 MR. ANGELI: We agree, Your Honor. We haven't  
4 offered any expert reports.

5 THE COURT: So my ruling is the reports do not come  
6 in. It's the testimony that the people have, not their  
7 reports.

8 Okay. That's where we are.

9 MR. FRANCIS: Your Honor, the last issue we have to  
10 deal with is Mr. Bundy's medical records and photos of  
11 Ryan Bundy in the hospital. The government has marked as an  
12 exhibit the entirety of Ryan Bundy's medical records. There's  
13 absolutely no reason these need to be shown to the jury.

14 THE COURT: Well, the photo of his wound is, though.

15 MR. FRANCIS: The photo of his wound is?

16 THE COURT: Admissible.

17 MR. FRANCIS: Your Honor, with respect, we disagree.  
18 There is no dispute that someone fired a round into the roof of  
19 Finicum's truck and that that round made a bullet hole in the  
20 roof of the truck, broke the window, and caused something to go  
21 flying into Mr. Bundy's shoulder. We would stipulate to all of  
22 that. There's no reason for the government to literally wave  
23 the bloody shirt and show photos like --

24 THE COURT: The photograph is relevant evidence. It  
25 will be received.

1 MR. FRANCIS: Your Honor, there's a sequence of  
2 photographs that they designated.

3 THE COURT: One.

4 MR. FRANCIS: They get one?

5 THE COURT: One photograph of the wound. No medical  
6 report.

7 MR. FRANCIS: Your Honor, the parties have agreed  
8 that CVs for expert witnesses will not be admitted. We did not  
9 designate any on our -- on our exhibit list.

10 THE COURT: The witness can briefly describe their  
11 background. We have one CV that was 72 pages long. I was  
12 amazed. But, yeah, the CVs, you can either -- you can do it  
13 two ways. You can have a one-page report, a CV, that  
14 highlights their background. We don't need how many speeches  
15 they gave to where and when and how many training missions did  
16 they go to. That's not helpful. In fact, it's the opposite.

17 So let me suggest that you have a mini CV for each of the  
18 experts. So I'll save you from trying to agree to it all.  
19 I'll so order it.

20 MR. FRANCIS: That's fine, Your Honor. Your Honor,  
21 we separately agreed that the CVs would not come in.

22 THE COURT: Well, I think a mini CV is fine. That's  
23 helpful for the jury to remember.

24 That's okay with you?

25 MR. MALONEY: Yes, Your Honor. If I could, could we

1 briefly revisit the Bundy medical record issue?

2 THE COURT: What's in there?

3 MR. MALONEY: There's a narrative from Mr. Bundy, his  
4 chief history of complaint, where he recounts how he was  
5 injured. We'd like to admit that.

6 THE COURT: That goes to a fact issue. It doesn't go  
7 into how his wound would be treated.

8 MR. MALONEY: Your Honor, we also would like to admit  
9 the portions where the doctor evaluated that injury and  
10 determined that it did not need to be removed. That goes to  
11 explain why the government does not have possession of that  
12 evidence. We would also like to admit the radiograph image of  
13 the 1.4 centimeter metallic object that is in Mr. Bundy. We  
14 think that explains the nature and the scope of the material  
15 that is in his body. And also --

16 THE COURT: What do you claim it is?

17 MR. MALONEY: Judge --

18 THE COURT: It's not a bullet. It's a fragment?

19 MR. MALONEY: I can't say whether it's a fragment of  
20 the bullet or --

21 THE COURT: But what -- excuse me. I don't mean to  
22 interrupt you. Go ahead.

23 MR. MALONEY: I cannot explain to the Court whether  
24 it's a fragment of a bullet. I can't explain to the Court  
25 whether it's a fragment of the roof or some other object of

1 debris that impacted him. We know he stated in the video that  
2 he got hit. We know that he was on scene and refusing medical  
3 treatment. We know that the defendant was interacting and one  
4 of the arresting officers with Mr. Bundy at the scene. We will  
5 prove, through witness testimony, that he actually moved  
6 Mr. Bundy's cowboy hat from his head. Those facts are  
7 determinative to the circumstances under which the shots were  
8 fired and when the defendant learned that the occupants in the  
9 vehicle were injured and potentially injured as a result of his  
10 shooting. We believe that that could -- that the jury could  
11 infer from that that it's at that point that Mr. Astarita  
12 determined that he needed to pick up brass and he needed to  
13 deny that he shot.

14 Those facts --

15 THE COURT: Wait a minute. What's that last  
16 statement? It's relevant to Astarita's state of mind about  
17 what?

18 MR. MALONEY: To Astarita's knowledge as to when  
19 occupants of the vehicle reported being injured by gunfire.  
20 That Mr. Bundy was reporting that he got hit and injured. When  
21 FBI went to treat him, he refused treatment and wanted to  
22 transported to medical. This is the medical treatment that he  
23 received.

24 THE COURT: So what has that got to do with the  
25 shooting?



1 MR. MALONEY: It goes to show when Mr. Astarita  
2 learned that he had -- that he had injured someone inside the  
3 truck.

4 THE COURT: So what?

5 MR. MALONEY: That's why he went to pick up shell  
6 casings and one of the reasons why he denied -- he denied the  
7 shooting. It's against FBI policy to shoot into a vehicle.

8 THE COURT: Oh? That's the first time I've heard  
9 that. Do you have proof on that?

10 MR. MALONEY: We will have witnesses and agents  
11 testify that FBI policy is not to shoot into a vehicle. FBI  
12 policy is to shoot armed suspects or a driver of a vehicle.

13 THE COURT: And those would be reasons why he did not  
14 report it?

15 MR. MALONEY: That's a reasonable inference that the  
16 jury could draw. Yes, Your Honor.

17 THE COURT: Your response?

18 MR. FRANCIS: Your Honor, the problem with that is --  
19 I want to link this back up to the exhibit we're actually  
20 talking about, which is the medical records. There's no  
21 evidence that Special Agent Astarita is aware of the medical  
22 records themselves. What the evidence they're talking -- they  
23 want to put on evidence about what Special Agent Astarita  
24 actually knew based on what he observed back on the scene,  
25 that's one thing; but this medical record is taken at the

1 hospital where there's no evidence that the defendant knew  
2 anything about -- about what happened at the hospital or that,  
3 in fact, when he's complaining that he got shot he actually got  
4 shot. Their stated reason why this is relevant doesn't  
5 actually link back up to the defendant at all.

6 THE COURT: The ruling of the Court is definitive.  
7 The photograph of the wound will be admitted. The remainder of  
8 the medical report is not relevant to the issues in this case.

9 MR. FRANCIS: Finally, Your Honor, the parties have  
10 agreed that Government Exhibit 16 -- we've objected to this on  
11 other grounds. Not -- without waiving that objection, this  
12 exhibit can be shown as a demonstrative but will not go back to  
13 the jury.

14 THE COURT: That's which one?

15 MR. FRANCIS: This is Government Exhibit 16.

16 THE COURT: Which is what?

17 MR. FRANCIS: Your Honor, I'll play it on the screen.

18 So this is a portion of the overhead video with a red  
19 circle drawn around an individual that tracks this individual's  
20 movements throughout the duration of the roughly  
21 eight-and-a-half-minute video.

22 THE COURT: What is wrong with that?

23 MR. FRANCIS: Your Honor, our issue is with the  
24 circle. We don't think that should go back to the jury. If  
25 they want to use that as an aid -- in an aid of testimony,

1 that's one thing. The government has agreed with this, and  
2 they do not intend to send this back to the jury.

3 THE COURT: Do you agree?

4 MR. MALONEY: We would prefer to have this as an  
5 exhibit. We think it's helpful to the jury. But it is a  
6 mod -- it is an enhancement that Mr. Piazza did to a video  
7 that's already in evidence, so we're happy to play it as a  
8 demonstrative and leave it at that if that's the Court's  
9 ruling.

10 THE COURT: Leave it as demonstrative.

11 MR. FRANCIS: Your Honor, that is it when it comes to  
12 the exhibits.

13 I have one other issue I wanted to raise to the Court  
14 while I still have the microphone, and it pertains to  
15 Mr. Turpen.

16 The Court may have -- we raised this argument in our trial  
17 brief as well, but understanding the Court's position, as  
18 articulated in the *Daubert* opinion, but I think it's worth  
19 pointing out that Mr. Turpen, indisputably, also relied on the  
20 same fuzzy smudges that Mr. Terpstra was using in order to  
21 place the people in his diagrams as well. He relied on nothing  
22 more than that. He had no other information that he was  
23 relying on that Mr. Terpstra did not have access to. So we're  
24 simply asking for consistency that Deputy Turpen's diagrams  
25 also be subject to the limitation that they can only place the

1 location of individuals to the extent that eyewitness testimony  
2 can put them there.

3 THE COURT: What are we talking about? What exhibit?

4 MR. FRANCIS: Your Honor, this encompasses  
5 Exhibits 129 through 132, as well as the testimony that would  
6 go along with them.

7 MR. ANGELI: We'll get them up for you in just a  
8 moment, Your Honor.

9 THE COURT: Okay.

10 MR. FRANCIS: It will be this exhibit and one similar  
11 to it, Your Honor.

12 THE COURT: Well, the officer is going to be here.

13 MR. FRANCIS: Yes.

14 THE COURT: He will be testifying.

15 MR. FRANCIS: Yes. That officer is not an eyewitness  
16 to any of the events that he's depicting in this diagram.

17 THE COURT: This deals only with the placement of the  
18 cars?

19 MR. FRANCIS: Of the individuals, Your Honor. Our  
20 concern --

21 THE COURT: Oh, I see what you now -- what you're  
22 talking about, yeah.

23 MR. FRANCIS: Your Honor, what we would be seeking is  
24 something similar to what the Court has already articulated for  
25 Mr. Terpstra. If Deputy Turpen wants to put this diagram up or

1 if the government wants to put this diagram up with just the  
2 cars and the trajectory and have people identify where they  
3 were, fine.

4 THE COURT: Well --

5 MR. FRANCIS: But having Deputy Turpen place them  
6 based on his viewing of the video and his viewing of the same  
7 fuzzy smudges --

8 THE COURT: I would have to have assurance from the  
9 government that you would have a witness who would verify the  
10 position of these people, and you're in a position to do that,  
11 I think.

12 MR. SUSSMAN: Well, first of all, Your Honor, this  
13 was the subject of litigation at the *Daubert* hearing, and the  
14 Court's ruled that this is admissible as it is. It's already  
15 that -- that's the Court's ruling, and that's in the order.

16 Second, Deputy Turpen described in some detail how he  
17 placed those people there with reference to fixed objects, the  
18 locations of which he knew, such as the corner of the vehicle,  
19 the wheel of the vehicle, the centerline, the fog line, things  
20 like that. But I anticipate that we would have the same  
21 witnesses who would be able to identify themselves in the FBI  
22 video would be able to place themselves on these diagrams as  
23 well.

24 THE COURT: I thought that was my statement, is  
25 you're going to have witnesses that can verify this, their

1 position.

2 MR. SUSSMAN: I presume so. With the exception of  
3 the blue figure, who's Agent Astarita, who, of course, we can't  
4 put on the stand to have him verify anything for us.

5 THE COURT: But the other people can tell where he  
6 was.

7 MR. SUSSMAN: I would anticipate so, yes.

8 THE COURT: Promise we have somebody to authenticate  
9 these people either -- I don't know what the sequence is,  
10 whether you're going to call Dickerson, Turpen, et cetera, or  
11 the other way around. As long as I have your assurance I'll  
12 have an independent witness to identify from that exhibit where  
13 those -- who those people were and where they were at that  
14 time, that's all the Court wants.

15 I would just trust the prosecution to assure the Court  
16 that that's going to happen. That's all we need.

17 MR. SUSSMAN: Well, then you have my assurance  
18 because, if we can't -- if we can't establish it, obviously  
19 we're not going to put that up there.

20 THE COURT: All right. Perfect.

21 MR. FRANCIS: Understood.

22 THE COURT: Okay. Anything further?

23 MR. CARY: Your Honor, one relatively minor thing on  
24 exhibits, and that is we had understood that the exhibit  
25 labels -- that we were using different number sets so that

1 there would be one joint set of exhibits and not government  
2 exhibits.

3 THE COURT: I thought that was settled?

4 MR. CARY: We've done that. But the government has  
5 "government" exhibit labels on their exhibits. Ours simply say  
6 "exhibit." And I know it sounds minor, in some ways, but  
7 there's a traditional jury instruction that's given to address  
8 the prejudice that one might have by there being different  
9 labels, like the government owns those exhibits, and we would  
10 ask that all the exhibits say -- simply say "exhibit" on them,  
11 not "government exhibit." And ours say "exhibit."

12 THE COURT: Who is going to change the labels?

13 MR. CARY: They're electronic, Your Honor.

14 THE COURT: Well, I thought you had an agreement with  
15 Becky that we just have the numbers and not who offered them.  
16 A lot of them are -- could be offered by either side.

17 So any problem with that?

18 MR. SUSSMAN: Your Honor, we're a week away from  
19 trial now.

20 THE COURT: What?

21 MR. SUSSMAN: We're just a week away from trial now,  
22 and I think it would be a little unseemly at this point to ask  
23 us to relabel all of our exhibits. We've got the burden of  
24 proof here, and I don't see what the problem is with calling an  
25 exhibit Government's Exhibit 1, Defense Exhibit 2000.

1 THE COURT: All I ask, I thought you had -- that you  
2 folks had agreed to just have them numbered without who offered  
3 them. But, traditionally, if you marked them, you've offered  
4 them. We call it your exhibit -- whatever they marked.

5 So considering the number of exhibits -- how many do you  
6 have?

7 MR. SUSSMAN: Well, with the removal of the CVs,  
8 we're probably down to around 250. I would guess somewhere  
9 thereabouts.

10 THE COURT: You have a thousand?

11 MR. CARY: Yes, Your Honor. All which simply say  
12 "exhibit."

13 THE COURT: I don't think changing who offered the  
14 exhibit is going to make any difference to the jury at all.

15 Counsel can explain to the jury that many of these  
16 exhibits were for both sides. The simple thing would be just  
17 to change your stickers.

18 MR. CARY: We understand it's an electronic process,  
19 Your Honor.

20 THE COURT: I didn't know that. Is that true?

21 MR. SUSSMAN: Where they're being presented  
22 electronically, I believe that is correct, Your Honor.

23 THE COURT: Well, let's just keep it -- just it'll be  
24 your exhibits. We'll take off the "government." Defense  
25 hadn't labeled theirs, so we just have exhibits. And even



1 mine, you don't have -- may I have your attention? Can I hear  
2 directly from your -- you can speak into the mic, please. No.  
3 Sit down and speak into the mic.

4 MS. HARRIS: Your Honor, I approximate about a day of  
5 my work because I have to remove the annotations and reapply  
6 them.

7 THE COURT: I just changed my mind. We're not going  
8 to fiddle around with -- this is minutia. Not having to do  
9 with anything the jury is going to do. Just leave them as it  
10 is.

11 My, what overwhelming argument that was.

12 All right. Now, the next thing is that I have the  
13 witnesses. We have David Klinger. I already expressed that  
14 I'm concerned because he was not offered at the *Daubert*  
15 hearing. The defense did put on their statistician, so I don't  
16 know why Klinger wasn't put up at that time. I also am  
17 concerned that without some issue being raised by anybody that  
18 they don't have a present memory of what shots were fired  
19 except, I think, one witness said he wasn't sure.

20 So do you want to state on your case for Klinger?

21 MS. FERGUSON: Yes, Your Honor. Meghan Ferguson,  
22 speaking for the defendant, with respect to the issue of  
23 Dr. Klinger's proposed --

24 THE COURT: By the way, good luck.

25 This is -- she's going for surgery. This is Edie Greene's

1 sister. Edie Greene was the co-author with Elizabeth Loftus,  
2 and sometimes Geoffrey, and a whole spew of these forensic  
3 psychologists, of which Klinger is also. So all I can say is  
4 that when we got into the eyewitness testimony, which these  
5 were famous for, the unreliability, the psychologists would  
6 talk generally about there's an issue in this case about the  
7 reliability of eyewitness testimony, but they would not check  
8 the individuals that were involved in the bank robbery or the  
9 assault and so forth.

10 I understand that you're trying to put Klinger in that  
11 slot, in that posture; but, in this case, other than one  
12 witness saying, "I'm not sure how many rounds I fired," I  
13 haven't heard any evidence that there's going to be a question  
14 of someone being traumatized to the point they can't remember  
15 even firing a weapon.

16 So you've got my somewhat biased opinion.

17 Go ahead.

18 MS. FERGUSON: Yes, Your Honor.

19 Special Agent Astarita's ability to present a complete  
20 defense, including the proposed testimony of Dr. Klinger,  
21 implicates his Fifth Amendment right to due process and his  
22 Sixth Amendment right to the effective assistance of counsel  
23 and the basic fairness of this trial. And the Court is correct  
24 in that Dr. Klinger's testimony will not be offered to prove  
25 that any specific officer on the scene experienced sensory

1 distortions or memory gaps; but it will be helpful to the jury,  
2 however, for Dr. Klinger to explain for jurors who may be  
3 unfamiliar with these phenomenon that are commonly experienced  
4 by officers, to explain how it is possible that each of the  
5 three potential shooters on that roadway may each sincerely  
6 believe that he did not fire shots four and five. It is  
7 important for the defense to be able to demonstrate this and  
8 for Dr. Klinger to be able to explain his research to jurors  
9 who may be totally unfamiliar with the kinds of distortions and  
10 recall issues that -- that the -- that his research and other  
11 research demonstrates that officers do commonly experience in  
12 these kinds of events.

13 And your -- the Court mentioned expert testimony regarding  
14 eyewitness identifications. The Ninth Circuit has also, in the  
15 context of child sexual abuse victims, allowed experts to  
16 testify generally without conducting specific interviews of  
17 parties involved in those cases regarding scientific studies  
18 that point to general characteristics that can be experienced  
19 by victims that would help to explain, for example.

20 THE COURT: In all those cases, the child was shown  
21 not to be able to articulate what happened.

22 Is there any showing in this case that any of these  
23 officers are unable to articulate what happened?

24 MS. FERGUSON: I think the evidence will show, for  
25 example, Your Honor, that there are, on the part of officers,

1 an inability to recall having fired. All of these officers --

2 THE COURT: Any one of the three?

3 MS. FERGUSON: Well, each of the three officers have  
4 denied taking shots four and five, and so, therefore, do not  
5 recall taking shots four and five. And at least one of the  
6 officers who took multiple shots, I believe, wasn't able to  
7 specifically recall the precise number of shots that he did  
8 take.

9 THE COURT: I remember that one, yeah.

10 MS. FERGUSON: And Dr. Klinger's research does speak  
11 to the specific issue of round count. His research shows that  
12 officers are often unaware of how many rounds they fired and  
13 often undercount their rounds when they fire multiple shots.

14 His research also does indicate examples of officers who  
15 were not aware, at the moment they pulled the trigger, that  
16 they were pulling the trigger, and it was only after external  
17 cues basically told them "I must have pulled the trigger" that  
18 they realized that.

19 In this case, we don't necessarily have external cues.

20 THE COURT: All right. Anything further?

21 MS. FERGUSON: No, Your Honor.

22 Oh, sorry. With respect to the timing, the defense has  
23 already indicated, in correspondence with the Court, that we  
24 did not understand the Court's order from October of 2017 to  
25 impose a requirement of simultaneous expert disclosure. We do

1 not believe Federal Rule of Criminal Procedure 16 contemplates  
2 simultaneous disclosure.

3 THE COURT: Well, I can tell you this: I have done  
4 dozens, if not hundreds, of *Daubert* evaluations. We always do  
5 them together. It's a pretrial matter. At the same time. Not  
6 necessarily that -- when I say "together," that they can  
7 testify separately, but we clear the expert *Daubert* issues  
8 in -- that are going to come into trial. So when you say the  
9 rule doesn't contemplate it, well, the practice certainly does,  
10 and so that's where we are.

11 I would prefer to not have an issue come up, with respect  
12 to counsel, to think that you didn't have to disclose your  
13 expert witnesses for the *Daubert* week we set aside, so I'm  
14 trying to avoid that issue. But let's hear from the defense --  
15 I mean, the prosecution.

16 MR. SUSSMAN: Well, in terms of timing, Your Honor,  
17 they've known from the outset what this case is about. It's  
18 been going for a long time. And we served them with a  
19 discovery request way back in February where we asked for  
20 expert discovery. They didn't give us anything. They told us  
21 they would give it to us along with their *Daubert* motion, and  
22 the discovery we got with the *Daubert* motion were just the  
23 witnesses we heard from at the *Daubert* hearing.

24 And we didn't learn until just three weeks before the  
25 trial about a criminologist and about a psychologist, who they

1 have since said will not be testifying, and about their new  
2 statistician, who is different than the one that testified at  
3 the *Daubert* hearing.

4 We also heard for the first time about their mechanic, but  
5 that is something that arose for the first time at the *Daubert*  
6 hearing. We don't have an issue with that.

7 The point is if it's going to be a -- could someone have  
8 fired without knowing about it? That's been in this case from  
9 the outset, and there's absolutely no reason why this shouldn't  
10 have been brought up at the beginning of this case, and there's  
11 no reason why it couldn't have been brought up at the beginning  
12 of this case.

13 But the point is that the Court has noted there is no  
14 evidence, not a shred of evidence, that have any of these  
15 officers fall into the kind of sensory distortions that  
16 Professor Klinger says sometimes happen. There was not a  
17 single one of those perceptions, at least as I read the  
18 article, that occur in a majority of the cases. Most of them  
19 were somewhere between 35 and 50 percent, and there's no  
20 indication that they occurred in this case. And especially  
21 when you consider all of the people out at the scene were very  
22 experienced, very highly trained tactical officers, and there's  
23 nothing that I saw in his research that suggested that those  
24 people were particularly or more susceptible to the sort of  
25 sensory perception distortions.

1           And so that being the case, Judge, it just doesn't fit the  
2 facts of this case. It's not helpful to the jury to have  
3 somebody come in here and say, "Well, it could happen. We  
4 don't know if it happened in this case, but it's possible. It  
5 happens sometimes. We don't know if it happened here, but it's  
6 possible it could happen sometimes."

7           It's just not helpful, Judge.

8           THE COURT: As I stated before, there's no evidence  
9 that anybody, with the exception of the one who didn't know how  
10 many rounds he fired -- he certainly knew he was firing. It's  
11 not an absence of "I didn't know I was -- my gun went off."  
12 There is no evidence that would justify the Court in allowing  
13 generalities of possibilities of something being the case.

14           On the other hand, some -- in the trial, if the defendant  
15 gets up and testifies that he has no memory -- he may well have  
16 fired the shots in dispute, but he has no memory of it -- that  
17 it's blocked out -- well, that isn't before the Court, and I  
18 don't know if it is going to be.

19           I don't have to speculate it.

20           So I'll wait and hear whether the defendant is going to  
21 testify; and, if so, if he's going to testify as to this  
22 particular issue. It will be excluded unless a foundation is  
23 laid.

24           Now, in respect to the -- that's a definitive ruling, to  
25 the extent it's possible.

1           When I say "it's definitive," unless the landscape changes  
2 with the testimony that would justify its admission, but  
3 certainly not on the record before the Court.

4           I really can't express my gratitude to the lawyers for the  
5 efforts you put in. It's just been a wonderful experience to  
6 have such competency from both sides. Particularly with  
7 complicated litigation like this, the work has been superb. I  
8 include in that, your offer -- your submission of the  
9 instructions. I'll give the preliminary instructions, but the  
10 issue is as to what am I going to instruct on and as to which  
11 counts? I would like to make a definitive ruling on the counts  
12 before we appear before the jury.

13           What is your position on Count 2?

14           MR. SUSSMAN: Your Honor, we moved to dismiss that  
15 this morning, and you granted it.

16           THE COURT: I know. I wanted to verify it.

17           Are there any other issues to be dismissed?

18           MR. SUSSMAN: Not at this time.

19           THE COURT: All right. Is there some issue as to it  
20 at another time? Are there some soft issues that you would  
21 rather not get into?

22           MR. SUSSMAN: Your Honor, we think -- well, we're  
23 convinced that the remaining counts are each properly charged  
24 as separate counts.

25           Now, one of the things that defendant has asked for in



1 their trial brief is that you reduce this entire case to a  
2 single count. But you can't do that because there are two  
3 separate substantive offenses, different statutes with  
4 different elements, and we can't just make one of them go away.

5 THE COURT: No. But take your hearings, your  
6 interviews, just -- you know, this morning we got whether we  
7 talk about a count or whether we talk about an interview --  
8 Interview No. 2 and Count No. 2 -- and they weren't the same.

9 So run through it, step by step, as to what is left as to  
10 the interviews.

11 MR. SUSSMAN: All right. Well, there were two  
12 interviews with Oregon State Police detectives. The first on  
13 the night of the shooting itself, and the second --

14 THE COURT: Well, no, but what was said at that  
15 interview by whom and to whom?

16 MR. SUSSMAN: Well, that -- those were individual  
17 interviews, Your Honor. Each of the operators spoke to the  
18 state police detectives individually.

19 On the first interview, Mr. Astarita went into some detail  
20 talking about the events leading up to the -- the incident at  
21 the roadblock. He described how Mr. Finicum's truck came  
22 accelerating rapidly toward the roadblock; how he was convinced  
23 that the truck was not going to stop; how he believed everybody  
24 was there -- that was there, all the law enforcement officers,  
25 were in danger; how at the last minute Mr. Finicum's truck

1 swerved off into the snowbank, narrowly missing Special  
2 Agent JN. Mr. Astarita firmly believed at the time that JN had  
3 been struck and might be dead.

4 He talked, you know, about knowing that the occupants of  
5 the vehicle were armed and believed to be dangerous. He talked  
6 about hearing -- he talked about hearing no shots fired until  
7 the time when Mr. Finicum ended up being shot and killed by one  
8 of the state -- by the state police officers.

9 He never mentioned during that interview that he had  
10 fired. He never mentioned during that interview that he had  
11 picked up brass.

12 THE COURT: Did anybody ask him?

13 MR. SUSSMAN: Not specifically because --

14 THE COURT: Well, that's the problem.

15 MR. SUSSMAN: Well, let me finish, please, if you  
16 would, because they were told at the outset that no HRT members  
17 fired, and that was based on the earlier statements that were  
18 told to Supervisory Special Agent IM and Supervisory Special  
19 Agent BM, and so the -- those initial lies ended up triggering  
20 the statements to the state police detective saying none of the  
21 HRT guys shot. They were only witnesses.

22 And so that -- so that is what happened at that end.

23 THE COURT: Well, that wasn't -- what did the  
24 defendant say about shooting at that first interview?

25 MR. SUSSMAN: He did not say he shot at that first

1 interview.

2 THE COURT: He didn't say anything.

3 MR. SUSSMAN: Right.

4 THE COURT: But he said all sorts of other things.

5 MR. SUSSMAN: Yes, he did.

6 THE COURT: He's charged with lying.

7 MR. SUSSMAN: Engaging in misleading conduct.

8 THE COURT: Well, now, are we talking about a lie, or  
9 are we talking about obstruction of justice?

10 MR. SUSSMAN: We're talking about one in the same. I  
11 mean, the charges --

12 THE COURT: No, they're not the same. They're  
13 separate counts.

14 MR. SUSSMAN: The charge is obstruction of justice by  
15 engaging in misleading conduct. Misleading conduct is defined  
16 in the statute in several different ways.

17 THE COURT: If you're offering that under the  
18 obstruction of justice, that's one thing. I'm asking you about  
19 the lies that he affirmatively denied shooting.

20 Now, we know at the beginning he didn't affirmatively deny  
21 shooting. He said, "You can't ask me that now, bro," et  
22 cetera, or a similar account.

23 That is not a specific confession "I did not shoot."

24 Then we have this interview that we talked about. Again,  
25 he did not affirmatively say, "I did not shoot." But there

1 were other occasions where he did, and that's what I want you  
2 to tell me.

3 MR. SUSSMAN: Oh, okay. Sorry. I misunderstood you.

4 The case in where he affirmatively said, "I did not  
5 shoot", first of all, were made to his direct supervisor,  
6 Supervisory Special Agent BM, who said, "Are you okay?" and  
7 "Did you shoot?" And he affirmatively said, "I did not shoot."

8 THE COURT: Right. That was at the scene.

9 MR. SUSSMAN: That was at the scene, and that's  
10 Count 1 of the indictment.

11 THE COURT: Fine.

12 MR. SUSSMAN: Then sometime later, within the next  
13 few days, Supervisory Special Agent TS again approached  
14 Mr. Astarita, along with BM and JN, and asked each of them, "Is  
15 it possible that you may have shot and not realized? Because  
16 if you did, we need to tell them." And to a man, according to  
17 TS, each of them specifically and explicitly denied shooting.

18 THE COURT: Including Astarita?

19 MR. SUSSMAN: Including Astarita.

20 THE COURT: Okay. Now you've got the two.

21 MR. SUSSMAN: That's Count 3.

22 THE COURT: Then where do you go from there?

23 MR. SUSSMAN: Now, in between those two instances,  
24 after the lie to BM but before the lie to TS, Astarita is  
25 interviewed by the state police, and that -- for that

1 interview, he's charged with obstruction of justice based on  
2 misleading conduct, because the state police officers are not  
3 federal law enforcement, and so 1001 doesn't fit.

4 THE COURT: So you're count what?

5 MR. SUSSMAN: That's Count 4, Your Honor.

6 THE COURT: Yeah.

7 MR. SUSSMAN: The second interview with the state  
8 police on February 6 is Count 5, and that's, again, obstruction  
9 of justice by engaging in misleading conduct.

10 THE COURT: Perhaps I'm losing counts. If we exclude  
11 the ones where he didn't expressly say, "I did not shoot,"  
12 which -- the ones he did say, "I did not shoot," are the lying  
13 ones.

14 MR. SUSSMAN: Correct.

15 THE COURT: They are Counts 1 --

16 MR. SUSSMAN: And 3.

17 THE COURT: -- and 3. 2 is gone.

18 MR. SUSSMAN: 2 is gone.

19 THE COURT: So 4 and 5 are obstruction of justice?

20 MR. SUSSMAN: Correct.

21 THE COURT: That's what I wanted to know. Thank you.

22 Now, your response, anybody?

23 MS. FERGUSON: Yes, Your Honor. So the government  
24 has to -- has agreed to dismiss Count 2, which is one of the  
25 three false statement counts, but that still leaves two false

1 statement counts and two obstruction of justice counts; so four  
2 criminal lying charges in total.

3 THE COURT: Wait now. Wait now. The lying counts  
4 are No. 1 and --

5 MS. FERGUSON: 3.

6 THE COURT: -- 3 okay.

7 MS. FERGUSON: Yes, Your Honor. So two false  
8 statements counts, 1 and 3; two obstruction counts, 4 and 5;  
9 four criminal lying charges in total. And that's still three  
10 too many criminal lying charges, because where there is one  
11 alleged lie and one alleged impairment stemming from that lie,  
12 as a matter of law, that supports one crime -- one charge of  
13 criminal lying. So we've asked the Court in our trial memo,  
14 and I ask the Court now --

15 THE COURT: You asked for that pretrial, and I  
16 already ruled on that when you moved to dismiss the indictment  
17 for multiplicity, so I -- your position is the same?

18 MS. FERGUSON: Correct. And --

19 THE COURT: That's the thing that I -- that I think  
20 the -- I don't dismiss -- I won't grant that on grounds that  
21 there involves similar -- same or similar conduct or  
22 multiplicity counts. I've already covered that. But I am  
23 concerned about the obstruction of justice. I'm not concerned  
24 about the two lying counts. That's fine.

25 The obstruction of justice counts, though, when somebody

1 is sitting in a room and they're asking everybody, "Did anybody  
2 shoot?" and he doesn't stand up and say, "I did" or "I  
3 didn't" -- he doesn't say anything -- my issue is how can that  
4 be obstruction of justice?

5 MS. FERGUSON: Yes, Your Honor, and for the reasons  
6 stated in our motion to dismiss, we do believe that that's a  
7 problem, especially with respect to Count 5, where the  
8 definition of "misleading conduct" requires there to be a false  
9 statement or at least there to be a statement from which  
10 something is omitted that makes it misleading.

11 And so with respect to the second interview, if there's  
12 silence on the part of defendant, that does not satisfy the  
13 definition of misleading conduct.

14 THE COURT: That's my feeling. I want to hear the  
15 government's response on obstruction of justice.

16 MR. SUSSMAN: Well, first of all, we don't agree with  
17 the defense that the defendant said nothing. There was a  
18 characterization by a detective who --

19 THE COURT: Well, they say he didn't talk as much as  
20 he did before, but he -- when asked to state, "Did anybody  
21 shoot?" he said nothing.

22 That's my recollection of the evidence. Do you want to  
23 correct that?

24 MR. SUSSMAN: That is an incomplete understanding of  
25 the evidence, Judge.

1           You haven't heard the evidence yet. That's the problem  
2 here.

3           THE COURT: Well, let's hear what you've got.

4           MR. SUSSMAN: Well, we have testimony from a state  
5 police detective who, as a matter of fact, conducted both  
6 interviews. He was one of the two detectives, was the same in  
7 each interview. And that detective will testify that at the  
8 outset of the second interview he -- and this is the group  
9 interview where they're all standing together in the gym. He  
10 sets up a laptop computer on the bleachers and he shows the  
11 overhead video from the FBI surveillance plane, and he stops it  
12 about the time shots four and five happen. And he says, "All  
13 right. Look, guys. The DA has already said that the shots we  
14 know about are justified. We just need to clear up who fired  
15 the unattributed shots." And we looked at all of them, and he  
16 said, "Did any of you shoot?" And they all denied shooting.

17           THE COURT: Right. They didn't deny shooting. They  
18 didn't say anything.

19           MR. SUSSMAN: No.

20           THE COURT: At least as far as the defendant is  
21 concerned.

22           MR. SUSSMAN: Well, as far as --

23           THE COURT: He did not deny shooting.

24           MR. SUSSMAN: He was right there.

25           THE COURT: Well, he did not deny shooting, correct,



1 except by inference?

2 MR. SUSSMAN: Well, Agent BM, you know, said --

3 THE COURT: Come on now. Let's --

4 MR. SUSSMAN: I'm trying to get there, Judge.

5 THE COURT: Did he open his mouth and say, "I did not  
6 shoot"? Did he say that? Yes or no?

7 MR. SUSSMAN: One second.

8 THE COURT: Come on. Don't get so hung up on your  
9 advocacy that you're blurring the facts.

10 Well, let me put it this way: The evidence that I deduce  
11 will be forthcoming. And your offer of proof is that they had  
12 everybody there. They're trying to find out about the shots in  
13 dispute. They've cleared out the shots that killed Finicum.  
14 And they said, "Now, did anybody here shoot those two shots?"  
15 And the defendant said -- did not say. The defendant did not  
16 say, "I fired those shots" or "I deny firing those shots."

17 MR. SUSSMAN: What we have in the report from the  
18 detective, Your Honor, is that it said none of them admitted  
19 shooting.

20 THE COURT: Okay. That's where we are. So he didn't  
21 deny it, as in words. He may have by inference of his conduct.  
22 That's about where you are, isn't it?

23 MR. SUSSMAN: Right.

24 THE COURT: Now, what did you say?

25 MS. FERGUSON: Our argument is that silence, that

1 making no statement, at all cannot be misleading conduct as a  
2 matter law.

3 THE COURT: I know that's what you think, but what  
4 does the law say about it that I instruct the jury? You can  
5 both answer.

6 MS. FERGUSON: Oh, the definition is that misleading  
7 conduct means knowingly making a false statement, intentionally  
8 omitting information from a statement, and thereby causing a  
9 portion of such statement to be misleading or intentionally  
10 concealing a material fact and thereby creating a false  
11 impression by such statement.

12 THE COURT: Okay. How do you match up to the  
13 instruction or the -- or the -- what was just stated?

14 MR. SUSSMAN: Well, at the very least, if they said,  
15 "None of us shot" --

16 THE COURT: They didn't say that.

17 MR. SUSSMAN: I believe at least BM said that. "None  
18 of us shot." Defendant is right there. Defendant hears him  
19 say that. Defendant says nothing. Defendant adopts that  
20 statement, by silence, as his own, and that's misleading  
21 because he shot, and he knew he shot. At least that's the  
22 government's allegation.

23 THE COURT: Your response?

24 MS. FERGUSON: Your Honor, we requested a jury  
25 instruction that silence, making no statement at all, cannot be

1 misleading conduct.

2 THE COURT: I know that's what you requested. I'm  
3 just asking you in respect to Mr. Sussman's statement.

4 MS. FERGUSON: Our position would be that even  
5 silence, in the face of a statement by another individual who  
6 is not on trial in this case, cannot constitute misleading  
7 conduct, and therefore cannot constitute obstruction of  
8 justice.

9 In addition, one of the detectives indicated that the  
10 defendant did not speak during that interview.

11 THE COURT: Yeah. Okay. My ruling is that that's  
12 not sufficient to justify obstruction of justice by just  
13 sitting there. This is a schooled person. He knows he does  
14 not have a legal duty to incriminate himself. His silence --  
15 certainly, if he had been given *Miranda* warnings, his silence  
16 couldn't be issued -- concerned as a -- could not be -- qualify  
17 as an adoptive admission. This is a close question. Close  
18 questions go to the defense.

19 That count will be stricken.

20 Now, your other count for obstruction, I would like to  
21 hear again. What's your evidence going to be?

22 Hang in there. Do you want a break?

23 MR. SUSSMAN: No, I'm good.

24 The evidence is going to be he made a very detailed  
25 statement during that. He talked about what happened leading

1 up to the incident, what happened at the incident, and I don't  
2 believe he talked very much about what happened after the  
3 incident. But the one thing he never said during that second  
4 interview, despite talking about how he thought Finicum was  
5 going to hit the agent, how he thought the agent had been hit,  
6 what he did, where he went, he said he couldn't remember  
7 exactly where he was or exactly what he was doing because he  
8 was moving around. But the one thing he never said during the  
9 course of making all those statements is, "Oh, by the way, I  
10 shot." And that creates a misleading impression, and that is  
11 sufficient, even by Ms. Ferguson's definitions of obstruction  
12 of justice.

13 THE COURT: Your response?

14 MS. FERGUSON: Certainly, the defendant did not make  
15 a false statement in his January 26, 2016, interview with  
16 Oregon State Police detectives. He did not --

17 THE COURT: This is not the lying count. This is  
18 obstruction.

19 MS. FERGUSON: Correct. And with respect to Count 4,  
20 the defendant did -- did speak, so that distinguishes it from  
21 Count 5; but I think the government would have to then revert  
22 to the definition of misleading conduct that falls under 3(b),  
23 intentionally omitting information from a statement and thereby  
24 causing a portion of such statement to be misleading or  
25 intentionally concealing a material fact and thereby creating a

1 false impression of such statement, and our position is, of  
2 course, that the defendant did not shoot and, therefore, he did  
3 not lie and wasn't attempting to create any sort of a false  
4 impression about that.

5 THE COURT: Getting back to the prosecution, I'm  
6 going to deny the motion to strike that count. I think it's  
7 sufficient to justify submission, if you want to do that. You  
8 know, we've had a lot of cases together. And as a student, I  
9 said, "You're prosecutors. Try the case with your elbows in.  
10 Keep it simple. Keep it straightforward. Don't -- if you've  
11 got a strong count, stay with your strong count. Don't team up  
12 with some mushy count."

13 You've got flat-out statements that he lied. You've got,  
14 now, that -- the inference of obstruction of justice. I'll  
15 leave it in if you want, but it's your call.

16 MR. SUSSMAN: We'd appreciate it if you would. We  
17 would also appreciate it if you'd let us present our evidence  
18 on Count 5 before you decide to take it away from the jury.

19 THE COURT: Well, I asked you what your offer of  
20 proof was, didn't I?

21 MR. SUSSMAN: You did.

22 THE COURT: All right. I assume that I can rely on  
23 that as your offer of proof in final pretrial conference as to  
24 what your evidence will be.

25 MR. SUSSMAN: Well, of course the testimony is likely

1 to be in a lot more detail than an offer of proof here in  
2 court, Judge.

3 THE COURT: Well, this was your opportunity. If you  
4 want, you can bring him in. We'll be available tomorrow.

5 MR. SUSSMAN: Well, Judge, I believe he's in Central  
6 Oregon, so -- but, in any event, et --

7 THE COURT: He can testify on the phone, can't he?

8 MR. SUSSMAN: We can try and find him, Judge.

9 In any event, I mean, I -- I know you had mentioned  
10 earlier that the statements that were made during that second  
11 interview might still be admissible regardless of whether the  
12 substantive count was still there.

13 THE COURT: Well --

14 MR. SUSSMAN: Because we think that's part of the  
15 whole -- the whole deceptive and misleading conduct, was the  
16 fact that it happened not once but twice.

17 THE COURT: As I said, it's out as far as the count  
18 is concerned, but not as -- as to what was -- what happened.  
19 It's out as far as a count on Count 2, but you can certainly  
20 offer it as relevant conduct.

21 MR. SUSSMAN: Count 5, Judge.

22 THE COURT: What?

23 MR. SUSSMAN: Count 5.

24 THE COURT: Okay.

25 MR. SUSSMAN: Okay. Thank you.

1 THE COURT: How is our court reporter holding up?

2 THE COURT REPORTER: I'm fine.

3 THE COURT: What is your next issue?

4 MR. SUSSMAN: Judge, the defendant, in his trial  
5 memo, had requested to be able to ask leading questions of  
6 every government witness or every witness who works for the  
7 government, I should say, regardless of which party calls the  
8 witness as their own. He points out that Rule 611 does allow  
9 for leading questions of a witness on direct examination that's  
10 identified with an opposing party; but, of course, that's  
11 discretionary with the Court.

12 And it seems to me, Judge, that, you know, if they're  
13 going to call a witness as their own witness, then they ought  
14 to be able to do a direct examination of the witness without  
15 asking a ton of leading questions; and, along those same lines,  
16 what they're -- the HRT agents that we've been dealing with, we  
17 would submit that under their logic, Your Honor, those HRT  
18 agents are clearly identified with the defendant in this case.  
19 Their bro; one of their teammates. Some of them have been  
20 overtly hostile toward us as we've been preparing this case for  
21 trial.

22 So to the extent that they want to be able to ask leading  
23 questions of, for example, Deschutes County sheriff's deputies  
24 or Oregon State Police officers, then we should be able to ask  
25 leading questions of all the HRT guys, as well, or we can just

1 all do normal direct examinations and not lead our witnesses.

2 THE COURT: Well, as far as leading questions, there  
3 are, I think, nine exceptions to that rule. I've already told  
4 you that I encourage narrative questions. They don't have to  
5 all be Q and A. You know, you were there -- time, place,  
6 person, presence -- and tell us what you saw and observed  
7 happened. That's fine.

8 As far as leading is concerned, if there's any showing of  
9 hostility, even though they may be police officers, that  
10 doesn't mean that they side with one side or the other.

11 So we'll follow the general rules. You can ask  
12 narratives. I am not saying that you have to, but they aren't  
13 forbidden; secondly, we will follow the normal rules as to  
14 direct questions by the calling party, and if there's a showing  
15 of hostility, leading questions will be permitted.

16 That's where we are.

17 MR. SUSSMAN: Your Honor, one more thing, and this is  
18 kind of a logistical trial issue that came up, and that is the  
19 *Daubert* hearing. Counsel used a lecturn placed in front of the  
20 witness and directly in front of the jury box.

21 THE COURT: Yeah.

22 MR. SUSSMAN: Because I think that's probably what  
23 they're used to, especially the guys from D.C.

24 THE COURT: I use it here all the time.

25 MR. SUSSMAN: What's that?



1 THE COURT: I use it here, quite frequently, for --  
2 the lecturn.

3 MR. SUSSMAN: For witness examinations?

4 THE COURT: Oh, no. I'm sorry.

5 MR. SUSSMAN: That's what I was getting at. At the  
6 *Daubert* hearing, that's one thing. There's no jury here. It  
7 doesn't really matter.

8 THE COURT: Our standard procedure in this  
9 jurisdiction is to ask questions from counsel table, so that's  
10 what we'll do.

11 MR. SUSSMAN: Very good. Thank you, Your Honor.

12 THE COURT: Anything further for the government?

13 MR. SUSSMAN: We've got a list we're going to  
14 double-check.

15 MR. MALONEY: We're working our list, Your Honor.

16 THE COURT: Well, let's take a break. Fifteen  
17 minutes.

18 Yeah, we still have the statistician that's different than  
19 the one we had before.

20 MR. FRANCIS: Yes, Your Honor.

21 THE COURT: We'll take that up after we get through  
22 our break.

23 (Recess taken.)

24 THE COURT: All right. You want to take on the  
25 objection to the statistician?

1 MR. MALONEY: Judge, we have consulted with counsel.  
2 We know who the statistician is. We have seen his -- his CV,  
3 but we have not seen his report, and that is waiting on a  
4 report from another defense expert, Mr. Liscio, and we haven't  
5 seen that report either.

6 So as we get those materials, if there are issues, we'll  
7 certainly identify them for the Court, after consulting with  
8 counsel, and seeing if we can't work something out; but we're  
9 not in a position to say that we agree to the admissibility of  
10 their testimony because we don't know what they're going to  
11 say.

12 THE COURT: Well, we will wait and see. What else do  
13 we have?

14 MR. MALONEY: Judge, I have some kind of "mode and  
15 manner of the presentation of evidence" questions. Mr. Sussman  
16 brought up the issue of questioning the witnesses from the  
17 podium. I understand the Court's -- we're going to adhere to  
18 the standard in this district and question from counsel table.

19 THE COURT: Sure.

20 MR. MALONEY: Counsel had requested that the  
21 government's case agents not sit next to the jury. We were  
22 thinking we would have them sit directly behind us so that  
23 they're accessible to us through the proceedings but not to be  
24 a distraction or interference.

25 THE COURT: That's fine. You can have them at the

1 counsel table. I don't care.

2 MR. MALONEY: Just so the court is aware.

3 THE COURT: Often we have the case agents at counsel  
4 table.

5 MR. MALONEY: We have three case agents on this case,  
6 Judge. We have --

7 THE COURT: Just keep them back there. Well,  
8 whatever. I don't care.

9 MR. MALONEY: I identify them only in case the Court  
10 had concerns about them being present during the testimony in  
11 the trial.

12 THE COURT: No.

13 MR. MALONEY: And we intend to have the jury view  
14 during and as part of the presentation of Mike Haag's  
15 testimony.

16 THE COURT: Say that again.

17 MR. MALONEY: We would like to do the jury view in  
18 conjunction with --

19 THE COURT: The jury view?

20 MR. MALONEY: Of the truck, Your Honor.

21 THE COURT: I thought you were going out in the  
22 boondocks.

23 MR. MALONEY: Do you want to take a road trip, Judge?

24 THE COURT: We'll have it downstairs.

25 MR. MALONEY: That will be towards the end of the

1 government's case, just so you get an idea of when to expect  
2 it.

3 THE COURT: Fine.

4 There was another thing. You didn't want the jury  
5 fiddling around with the box.

6 MR. MALONEY: And we do not intend to offer the box  
7 as evidence in this case. We may offer the box as a  
8 demonstrative aid for Mr. Haag to demonstrate the rocker --

9 THE COURT: That's fine.

10 MR. MALONEY: Judge, you mentioned the possibility of  
11 doing an offer of proof tomorrow morning for the presentation  
12 of evidence on Count 5.

13 THE COURT: Any time that's convenient. I can  
14 accommodate you any time this week. We have other matters set,  
15 but we can work it out.

16 MR. MALONEY: We appreciate the Court's advice to the  
17 "elbows in" approach for the prosecution. We're going to  
18 consider that. Right now we're trying to see when the witness  
19 would even be available to make the trip. He's out of  
20 Lakeview --

21 THE COURT: I don't need him to be here. I can take  
22 him over the phone. He can go to Kinkos, and we can take him  
23 up on 16.

24 MR. MALONEY: We may well let the Court -- not ask  
25 the Court to reconsider its ruling and proceed as the counts

1 currently stand, but we want to think that through and see how  
2 the rest of this case is going to shape up with the evidence  
3 that we have.

4 THE COURT: That's fine. You've got 100 witnesses  
5 and a thousand exhibits. A lot. Both sides should do some  
6 substantial trimming. That's just because of the -- the  
7 nature. I appreciate -- these are all contingent suggestions,  
8 not what's going to happen. So what I need is what's going to  
9 happen, so --

10 MR. MALONEY: To give the Court some idea of the  
11 reasoning behind the government's case, we are calling a number  
12 of witnesses only to establish the fact that they were at the  
13 scene and they did not remove any shell casings, and they have  
14 no knowledge of anyone removing shell casings. So those  
15 witnesses may go fairly quickly, but that's the -- there's a  
16 large amount of the government's case that is about --

17 THE COURT: Well, you can reach -- certainly, you can  
18 reach a stipulation that as to these people, that they didn't  
19 find anything or they didn't do anything, unless they have  
20 something else to offer.

21 MR. MALONEY: I understand. Thank you, Judge.

22 THE COURT: Okay.

23 MR. CARY: Your Honor, we have a number of items left  
24 to cover, and we can do them in whatever order you want, but  
25 here is what we see --

1 THE COURT: I'll abide by your order. Whatever you  
2 want.

3 MR. CARY: All right. The first thing, Your Honor,  
4 is there are a number of stipulations in the trial brief that  
5 we just wanted to make note of. I think they're already in the  
6 record. I don't think there's a need to read them again, but  
7 there are a number of stipulations we've noted in our trial  
8 brief.

9 THE COURT: We don't need to read them. That's fine.

10 MR. CARY: The next is jury instructions, Your Honor,  
11 if you intend to address jury instructions today.

12 THE COURT: I will read the stipulated fact  
13 situation. You want me to do that right at the beginning,  
14 don't you?

15 MS. PERINI-ABBOTT: Yes, Your Honor.

16 MR. CARY: Yes, Your Honor.

17 MS. PERINI-ABBOTT: Sorry.

18 MR. CARY: No, that's yours.

19 MS. PERINI-ABBOTT: I'm tasked with jury  
20 instructions, so I jumped in to answer that question.

21 THE COURT: Okay.

22 MS. PERINI-ABBOTT: We're ready to address any other  
23 jury instruction issues now, or we can address them, perhaps,  
24 since one of the counts the government still may make an offer  
25 of proof on. The Court may want to hold off on other jury

1 instructions.

2 THE COURT: I have your defendant's proposed jury  
3 instructions. I have the government's requested jury  
4 instructions. Let's put you to work. Why don't we take yours.

5 MS. PERINI-ABBOTT: Sure. We did come to agreement  
6 on the vast majority of jury instructions, the joint proposed  
7 jury instructions. The few that we did not reach agreement  
8 on --

9 THE COURT: That's the one I'm looking at.

10 MS. PERINI-ABBOTT: So the first one we did not reach  
11 agreement on is whether or not the defendant is entitled to a  
12 specific unanimity instruction on the 1001 counts.

13 THE COURT: I'm looking at the correspondence I have.  
14 These are only the instructions that you were unable to reach  
15 an agreement on.

16 MS. PERINI-ABBOTT: Yes, Your Honor. The first  
17 one --

18 THE COURT: I'm looking at page 3.

19 MS. PERINI-ABBOTT: Yes. The first one is that we  
20 propose an "other acts of the defendant" instruction --

21 THE COURT: Yes.

22 MS. PERINI-ABBOTT: -- to address --

23 THE COURT: Page 3?

24 MS. PERINI-ABBOTT: Page 3.

25 -- to address the issue of him being seen. Well, we don't

1 know if it's him, as we've talked about with Motion in Limine  
2 1, but various HRT operatives, and the government intends to  
3 suggest that at least one of them was our client being seen  
4 walking around, after the fact, picking up -- possibly picking  
5 up shell casings -- at a minimum, bending down.

6 We want it to be clear to the jury that he's not charged  
7 with taking evidence or hiding evidence. Particularly, in a  
8 case where the issue is false statements and obstruction, we  
9 think it needs to be clear that that evidence is not -- is not  
10 the crime charged in this case, and that's why we propose that  
11 the Court use the pattern instruction for other acts of the  
12 defendant.

13 THE COURT: Counsel?

14 MR. SUSSMAN: This is not the pattern instruction,  
15 Judge. This has argumentative stuff.

16 THE COURT: I can't hear you. Speak into the mic.

17 MR. SUSSMAN: Is that better?

18 THE COURT: Yes.

19 MR. SUSSMAN: This was not the pattern instruction  
20 they're proposing here. This is a lot of their interpretation  
21 and their spin on the evidence. It is argumentative. It is  
22 not a neutral and balanced statement of the law, and we think  
23 there's some serious problems with it.

24 First of all, the very first paragraph says, "You have  
25 heard testimony and seen evidence that the defendant, at the



1 direction of his supervising agent, searched the scene with  
2 other FBI agents, looking for specific sensitive items."  
3 That's their spin on the evidence. That's their interpretation  
4 of the evidence. And that is not the inference that we're  
5 going to be asking the jury to draw, and we don't think you  
6 should give the Court's imprimatur to their spin on the  
7 evidence.

8 If you want to give an "other acts" instruction, just give  
9 the pattern instruction without inserting comments on what  
10 their interpretation of the evidence is.

11 And then in the last paragraph it says here, "Remember  
12 that the defendant is on trial here only for making statements  
13 and obstructing justice by not making certain statements.

14 In fact, he is charged with obstructing justice by  
15 engaging in misleading conduct, which is broader than not  
16 making certain statements. So that is a misstatement of the  
17 law. It is a misstatement of the charge, and we think that  
18 this instruction is improper.

19 THE COURT: I will give the standard jury  
20 instruction, without the additional conduct which -- without  
21 the additional language which is italicized.

22 MS. PERINI-ABBOTT: Your Honor, just one point on  
23 this. And I apologize. Our instruction only cites MCJI 4.3,  
24 but MCJI 2.11 is the "other crimes" instruction that's given in  
25 the middle of trial, and it does ask that some summary of the

1 evidence be given, which was what I inserted in italics, what  
2 we expect the evidence will show with regard to this. Of  
3 course, maybe we could draft the language summarizing it once  
4 the evidence comes in because the government seems to think the  
5 evidence will come in differently than the defense expects.

6 THE COURT: I will be giving the standard  
7 instruction, and you can put whatever gloss you want on it.

8 MS. PERINI-ABBOTT: There will be some summary that  
9 we will have to come to agreement on.

10 THE COURT: I try not to mix the facts with the  
11 instructions. I'll give the -- the broad scope, and then you  
12 fill in the -- the rest --

13 MS. PERINI-ABBOTT: Okay. Thank you, Your Honor.

14 THE COURT: -- in your arguments.

15 Go ahead.

16 MS. PERINI-ABBOTT: The next instruction is on  
17 specific unanimity for Counts 1, at which can now be removed  
18 any reference to Count 2. The pattern instruction for 1001,  
19 although it's not in the text of the instruction, if you have  
20 the pattern jury instruction manual, the commentary makes  
21 explicit that a specific unanimity instruction is appropriate  
22 in certain circumstances for 1001 charges when the exact  
23 statement is not clear.

24 And here, because the indictment does not actually charge  
25 exactly what was said, we are asking that the jury be required

1 to agree on what was said, what was material, and what was  
2 false, which is a correct statement of the law and sanctioned  
3 by the commentary of the Ninth Circuit pattern instructions.

4 THE COURT: Well, I -- you want to comment?

5 MR. SUSSMAN: I can do better than comment, Judge. I  
6 mean, we prepared a bench memo for the Court on specific  
7 unanimity, which I would be happy to forward to the Court; but,  
8 basically, the Ninth Circuit has said over and over and over  
9 again that, generally speaking, a general unanimity instruction  
10 is all that's required to tell the jury that they have to agree  
11 unanimously. Unless the count is so complex or so encompassing  
12 that there's a real risk of confusion or a real risk that  
13 they're going to convict the defendant for conduct he did not  
14 engage in or that was not charged in the indictment.

15 Judge, what we're talking about with the remaining false  
16 statement counts is, "Did you shoot?"

17 "No, I didn't shoot."

18 It can't get any simpler than that.

19 THE COURT: I know. That's what I was trying to tell  
20 you earlier.

21 MR. SUSSMAN: And that being the case --

22 THE COURT: And not this adopted admission of --

23 MR. SUSSMAN: That being the case, Judge --

24 THE COURT: I know, but --

25 MR. SUSSMAN: -- there's absolutely no need for a

1 specific unanimity instruction.

2 THE COURT: It's now been trimmed down by the Court,  
3 against your objection, to specific -- to a specific statement  
4 of denial, and so that's all I'm going to give, is just that  
5 they have to prove the elements of the offense to the  
6 satisfaction of each one, and that's just -- I'm not going to  
7 give this instruction --

8 MR. SUSSMAN: Thank you.

9 THE COURT: -- as such.

10 Obstruction of justice is on page 5.

11 MS. PERINI-ABBOTT: Yes, Your Honor. It might  
12 actually be helpful to take out the government's instruction on  
13 this count. They're not that different, but there are two  
14 specific differences that I want to highlight for the Court  
15 which -- where I think that our instruction is more in line  
16 with the Ninth Circuit pattern instructions and a little bit  
17 more clear.

18 THE COURT: Thank you.

19 MS. PERINI-ABBOTT: So if you look at the government  
20 proposed instructions on page 3 --

21 THE COURT: Okay. I've got it.

22 MS. PERINI-ABBOTT: -- they're largely the same. And  
23 here are the two differences, at least, that matter to us: In  
24 element two, they state only that the defendant acted  
25 knowingly. We suggest defining "knowingly" within that element

1 of the instruction, just as the pattern instructions do for  
2 18 U.S.C. 1001. And if you want to, I can point you to where  
3 in the joint instructions it does so. But it's mostly for  
4 consistency between the instructions that we define the element  
5 there.

6 THE COURT: I've got your point. Any objection?

7 MR. SUSSMAN: We just had knowingly in a separate  
8 supplemental instruction.

9 THE COURT: That's fine. I'll give it as you  
10 requested.

11 MS. PERINI-ABBOTT: Okay. So, then, the other  
12 difference we don't need to point out?

13 THE COURT: No.

14 MS. PERINI-ABBOTT: The next instruction we propose  
15 that differs from the government is in misleading conduct.

16 THE COURT: Yes.

17 MS. PERINI-ABBOTT: There are two differences between  
18 our instruction and the government's on this. The first  
19 instruction I would believe is likely an oversight by the  
20 government, but then inserting the statutory definition of  
21 "misleading conduct," they leave out the final words of  
22 "created a false impression." That's where they stop the  
23 sentence. And the actual sentence goes on "by such statement."

24 I'm on the fourth line of my first paragraph in the middle  
25 of the sentence.

1           So let me read the whole sentence. "The defendant engaged  
2 in misleading conduct if you find beyond a reasonable doubt  
3 that he knowingly made a false statement, intentionally omitted  
4 information from a statement" --

5           THE COURT: Wait. Wait. Did you look at the court  
6 reporter?

7           MS. PERINI-ABBOTT: Sorry.

8           THE COURT: She's frowning.

9           MS. PERINI-ABBOTT: I will do better.

10          THE COURT: Okay. Slow down.

11          MS. PERINI-ABBOTT: -- "intentionally omitted  
12 information from a statement and thereby caused a portion of  
13 such statement to be misleading, or intentionally concealed a  
14 material fact and thereby created a false impression by such  
15 statement."

16          The government's proposed instruction just leaves off  
17 those final three words which we think need to be in there to  
18 be consistent with the statute.

19          The more substantive difference is that the government  
20 objected to our addition of the statement silence, i.e. making  
21 no statement at all, is not misleading conduct. The Court  
22 found that that essentially is a correct statement of the law  
23 in ruling on our Count 5 motion, and we think it belongs in the  
24 jury instructions as a correct statement of the law.

25          MR. SUSSMAN: Well, if you have taken Count 5 away,

1 there's no allegation that he simply remained silent during the  
2 conduct giving rise to Count 4. That being the case, there's  
3 no reason to have that line in there. If Count 5 was still in  
4 there, they would have a better argument for it; but if Count 5  
5 was gone, there is no issue of silence because he talked a lot  
6 during the conduct giving rise to Count 4.

7 THE COURT: It's changed materially, so you don't  
8 need that.

9 MS. PERINI-ABBOTT: The Court will give the remainder  
10 of our instruction to ensure the complete statutory language?  
11 I'm comparing it to --

12 THE COURT: I don't know that I understand it.

13 MS. PERINI-ABBOTT: If you look at page 5 of the  
14 government's --

15 THE COURT: I'm looking at page 6 of yours.

16 MS. PERINI-ABBOTT: Page 6 of mine -- of ours; page 5  
17 of the government's. If you look one, two, three -- fourth  
18 line down on the government's, the sentence ends at "created a  
19 false impression."

20 THE COURT: Yes.

21 MS. PERINI-ABBOTT: The actual statutory language in  
22 18 U.S.C. 1515, that sentence continues by saying "created a  
23 false impression by such statement."

24 THE COURT: Okay.

25 MS. PERINI-ABBOTT: That was likely an oversight by

1 the government, but we ask that it be included.

2 THE COURT: "Knowingly" is defined on page 6 of the  
3 government. I thought we've already covered "knowingly."

4 MS. PERINI-ABBOTT: Yes. We covered "knowingly" in  
5 the element, as we requested.

6 THE COURT: Yes. Earlier.

7 MS. PERINI-ABBOTT: Yes.

8 THE COURT: Yes, that's fine. It won't be repeated.

9 Okay. Then the next is your --

10 MS. PERINI-ABBOTT: Our next proposed instruction is  
11 defining a false statement, and that, in fact, is also covered  
12 now that you've adopted our definition of the elements, so we  
13 will withdraw that one.

14 THE COURT: That's fine. Thank you.

15 MS. PERINI-ABBOTT: Our final proposed instruction  
16 relates to element four of 18 U.S.C. 1512. And I think this is  
17 another situation in which we need to look at the government's  
18 to understand the changes that we made.

19 THE COURT: All right.

20 MS. PERINI-ABBOTT: So if you'd look at the  
21 government's at page 12.

22 THE COURT: All right.

23 MS. PERINI-ABBOTT: Let me flip back to our proposed  
24 instruction. We essentially take issue with how broad of a  
25 statement they were asking the Court to make at the beginning



1 of this instruction where it says, "I instruct you that an  
2 alleged shooting by a law enforcement officer while acting  
3 under color of law does, in fact, constitute a potential  
4 federal offense." I think that it's more appropriate to  
5 actually just reference the statute where -- so the way we  
6 phrased it "The United States must prove that the information  
7 the defendant intended to prevent, hinder, or delay related to  
8 the commission or possible commission of a federal offense,  
9 specifically the use of unreasonable force under color of law."

10 The statement that any officer-involved shooting --

11 THE COURT: Oh, wait now. You just jumped. I'm  
12 looking at your page 8.

13 MS. PERINI-ABBOTT: Yes. In short, we believe our  
14 page 8 is a correct and complete statement of the law and that  
15 the government's version contains extraneous statements that,  
16 while may be technically true, are confusing to a jury. So in  
17 defining element four, we think our instruction is a more clear  
18 instruction.

19 MR. SUSSMAN: I think just the opposite, perhaps not  
20 surprisingly, because what their requested instruction number  
21 six does is it requires the jury to make a finding,  
22 essentially, of a civil rights violation. What the  
23 government's instruction says is that the excessive use of  
24 force by a law enforcement officer can constitute a federal  
25 offense. There's no requirement that they find the underlying

1 crime has occurred or that the defendant committed the  
2 underlying crime or that the defendant is guilty of committing  
3 the underlying federal offense, only that the federal -- that  
4 he acted with the intent to prevent the communication of the  
5 commission of a possible federal offense to a federal law  
6 enforcement agent, and there's just absolutely no question that  
7 the unreasonable use of force, under Section 242, is a federal  
8 offense, and so the jury need not -- I guess what they're  
9 inviting the jury to do is make a finding that the defendant,  
10 in fact, committed the underlying offense, and that is not  
11 required by the case law.

12 MS. PERINI-ABBOTT: Your Honor, if I may be heard? I  
13 think our instruction is explicitly clear that they need not  
14 make that finding.

15 I also think Mr. Sussman's statements emphasized why their  
16 first statement is confusing and perhaps a misstatement of the  
17 law. Their statement is, "I instruct you that an alleged  
18 shooting by a law enforcement officer" -- they have now zoomed  
19 out so far away from the actual crime of 18 U.S.C. 242, that it  
20 would be the equivalent of saying, "I instruct you that making  
21 any statement to a bank could be a federal offense." Sure, if  
22 it's false and it meets these other requirements.

23 I think if we use the actual language that Mr. Sussman  
24 used, some of our objection goes away. The use of excessive  
25 force or the unreasonable use of force, rather than just

1 instructing the jury that any alleged officer shooting could be  
2 a federal offense which unfairly implies, perhaps, that  
3 Special Agent Astarita is being charged or could have committed  
4 some other federal offense and just dramatically oversimplifies  
5 what Section 242 really charges.

6 MR. SUSSMAN: She does make a valid point there,  
7 Your Honor. Perhaps we could work on the language of that  
8 requested element instruction and come back to the Court with  
9 something that the parties can agree on.

10 THE COURT: That's fine, but I'm satisfied with the  
11 defense's request. If you want to modify it, just let me know.

12 MR. SUSSMAN: Okay. Thank you.

13 THE COURT: Now --

14 MR. CARY: Another issue on our list, Your Honor, is  
15 we've had a number of discussions with the government about  
16 whether witnesses will only be called one time; for example,  
17 if --

18 THE COURT: No, we'll just do it one time.

19 MR. CARY: Thank you, Your Honor.

20 The next issue is we very much appreciate, and I think the  
21 government does as well, the opportunity to use a jury  
22 questionnaire, and we think that's actually, hopefully, going  
23 to make jury selection go faster.

24 THE COURT: I'm not worried about the fastness. I'm  
25 worried about getting the job done. All right. Go ahead.

1 MR. CARY: I was hoping to inquire as to how jury  
2 selection is going to proceed once we have the questionnaires  
3 back just so we can understand logistically whether people will  
4 be seated in the box, whether you'll follow up. I want to  
5 understand.

6 THE COURT: What we do is we sit as many as we have  
7 seats here. We have the visitors move away from segments in  
8 the courtroom, and then we'll call the 14, and then I -- since  
9 we're using the questionnaire, it's going to cut down, that  
10 will give us the opportunity to look at the options. 16  
11 options. Plus, I don't know how many peremptories you need for  
12 an alternative. I couldn't sell you on stipulating to less  
13 than 12, but I didn't expect it.

14 MR. CARY: Your Honor, we're not going to do that.

15 THE COURT: All right. So you'll know, so you can  
16 make an intelligent choice for both sides, as to who is going  
17 to be the option. So we'll be -- we might lose people, right,  
18 for cause, once they get in the jury box and start answering.

19 I will abandon my life sketch method I usually use because  
20 we already know all about their background, so I will be doing  
21 a minimum amount of the follow-up questions. I'll leave it up  
22 to counsel. I don't like your proposed follow-up questions.  
23 I'm not going to ask them. I'm not going to put the Court's  
24 imprimatur on questions such as, "The government charges only  
25 guilty people" or things of that nature, but you will have to

1 relook at yours to see if that's what you really want to ask a  
2 juror.

3 But both sides will be given the opportunity to follow up  
4 with questions. The government has the burden of proof, so the  
5 government will go first. And then we can do it with each --  
6 the follow-up questions should -- they can be both general or  
7 you can pick out some juror, at your option, who said something  
8 that you wanted to inquire about. So we'll have the government  
9 go through with their questions of the whole panel or  
10 individuals, and we'll have you do the same thing, go through  
11 the whole panel of questions or follow-up questions.

12 It may be that you would prefer after the -- I'll ask you.  
13 What would be your preference as follow-up questions? Do you  
14 want to -- you've signaled -- who's going to handle the voir  
15 dire?

16 MR. MALONEY: I'm going to handle voir dire for the  
17 government, Judge.

18 THE COURT: What would be your preference as to if we  
19 ask for you to inquire of the jury? Do you want to do the  
20 whole thing at once, or do you want to take them one at a time?

21 MR. MALONEY: I'm comfortable either way, Judge. I  
22 can do the whole room if that's -- if that helps move things  
23 along.

24 THE COURT: I have no preference. I have -- do you  
25 have a preference?

1 MR. ANGELI: Our preference would be individually,  
2 Your Honor.

3 THE COURT: What?

4 MR. ANGELI: Our preference would be individually.

5 THE COURT: Okay. We'll take them one at a time.  
6 That's fine.

7 Now, have you had enough? Anything further?

8 MR. MALONEY: Just to clarify, when we say "do them  
9 one at a time," I would like to voir dire the panel as a whole  
10 and ask individual questions in follow-up from a general  
11 question down to an individual question. Is that permitted, or  
12 do I have to question witness one and finish questioning that  
13 witness or, I mean, juror -- juror two?

14 THE COURT: I asked you, first, what was your  
15 preference, and you didn't state, that I heard, and then  
16 counsel said he would like to do it one at a time. Now you've  
17 asked to do it generally. I'll grant that to you.

18 MR. MALONEY: Thank you, Judge.

19 THE COURT: You can do it, and then when -- if he  
20 gets a response that you want to follow up on, you can do it at  
21 that time, so --

22 MR. CARY: Then, if I --

23 THE COURT: We're going to have the general  
24 statements by them, and then they're going to have  
25 individual -- spot around individual questions; but once they

1 go to individual questions, you can step in at that point.

2 MR. ANGELI: Okay.

3 THE COURT: Will what work?

4 MR. CARY: Your Honor, I'm sorry. I have one other  
5 question. Mr. Angeli is actually handling this. If he  
6 understands, I guess that's good enough, but when we offer  
7 for-cause challenges, when would you prefer the for-cause  
8 challenges be made, Your Honor?

9 THE COURT: Oh, the challenge -- I thought we covered  
10 this. We use both jury rooms. We send the jury out and --

11 DEPUTY COURTROOM CLERK: We wanted to do it like we  
12 did it last time and just leave them all in here in order.

13 THE COURT: Whatever. They'll spot the jury away.  
14 We never exercise challenges in front of the jury. And then if  
15 you get a challenge for cause, just hold that until -- let's  
16 figure out what we're going to do with our -- after we impanel  
17 the whole jury. You might change your mind.

18 MR. CARY: Okay.

19 THE COURT: The challenges for cause are always done  
20 outside the presence of the jury.

21 MR. CARY: Right.

22 THE COURT: So what we'll be doing is that we'll send  
23 them all out there. If you have a question -- a challenge for  
24 cause, I'll take it up at that time. That will give you  
25 additional peremptories, so it's -- it will work out.

1           The other thing is how do you want to handle it on your  
2 challenges? Of course, I would take the challenges for cause  
3 first, and then we clear those for both sides. But then when  
4 we get to the peremptories, do you want to do that by handing  
5 in your peremptories simultaneously, or do you want to do them  
6 you go first, they go, you go, they go, et cetera?

7           MR. MALONEY: We would prefer to take turns,  
8 Your Honor.

9           THE COURT: That's fine. I don't care.

10          MR. ANGELI: That's fine with us, Judge.

11          THE COURT: That's fine. This really is no problem.  
12 It's just that we never embarrass jurors. When we tell them  
13 the rest of them can go, we don't even tell them who's been  
14 challenged. We just thank them for their service and go from  
15 there.

16          MR. MALONEY: Just so I'm clear, understanding the  
17 mode of the challenges, the government would challenge first  
18 with one challenge, defense would challenge next with two  
19 challenges on the peremptories, and then we would take turns  
20 back and forth until we are either out of peremptories or we're  
21 satisfied?

22          THE COURT: Yeah. Please don't be out of  
23 peremptories. You're getting too many anyway. Especially the  
24 defense.

25          All right. What else have you got?



1 MR. CARY: Your Honor, I have one more issue, which  
2 is openings. We have had some discussions about what we're  
3 going to use in opening, but I don't think we have a common  
4 understanding of some ground rules in terms of what we can use.

5 THE COURT: You can use any -- have a seat. I have  
6 watched all sorts of openings, and it's essentially recognizing  
7 this is not a time for argument. This is a time for you as to  
8 what you expect the evidence to be. I don't put a time limit  
9 on your opening statements.

10 The next issue is to what statements you want -- what  
11 evidence you want to use to supplement your opening statements.  
12 That's an individual advocate's point of view. Who's going to  
13 make the opening statement for the government?

14 MR. SUSSMAN: I am, Your Honor.

15 THE COURT: All right. What would be your position  
16 on using exhibits in your opening statement?

17 MR. SUSSMAN: I typically don't.

18 THE COURT: What?

19 MR. SUSSMAN: I typically do not.

20 THE COURT: Okay. What is your position?

21 MR. CARY: And we're willing to live by those same  
22 rules, as long as it's the same for both of us.

23 THE COURT: All right. We won't use the exhibits  
24 during the opening statement. That's fine.

25 MR. SUSSMAN: Thank you, Your Honor.

1 THE COURT: Again, this is your opportunity to state  
2 what you want. I will have given the preliminary instructions  
3 so they'll have it. I'll also give them the statement of the  
4 case. Do you want me to give them a copy of it or just read  
5 it?

6 MR. CARY: Just read it, Your Honor, would be our  
7 preference.

8 MR. SUSSMAN: That's fine, Your Honor. Thank you.

9 THE COURT: I'll just read it.

10 MR. CARY: I'm out of issues, Your Honor.

11 THE COURT: All right.

12 Well, it's 7:00 your time. Close.

13 Mr. Sussman, you're just getting started.

14 MR. SUSSMAN: Well, it's about that time, Your Honor.

15 THE COURT: Yes.

16 MR. SUSSMAN: We're good.

17 THE COURT: Thank you. See you then.

18 MR. MALONEY: We haven't heard back from the witness,  
19 Your Honor, so we'll be in --

20 THE COURT: I tell you what. I'm just going to use  
21 the opening statement -- I mean, the offer of proof that I got.  
22 Anything you want to do, you just submit it to me as an offer  
23 of proof.

24 MR. MALONEY: Thank you, Judge.

25 THE COURT: Thank you. So I'll see you next week.

1           If you have any questions, please, please call me. Just  
2 have Becky set up a conference call, and so -- then also  
3 whether you need a reporter; but, just, let's not have a lot of  
4 new issues come at the last -- see you next week.

5                               (Hearing concluded.)

C E R T I F I C A T E

United States of America v. W. Joseph Astarita

3:17-cr-00226-JO

PRETRIAL CONFERENCE

July 16, 2018

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter  
Oregon CSR No. 98-0346

Signature Date: 7/20/18  
CSR Expiration Date: 9/30/20